H.R. 3176, TO REAUTHORIZE THE RECLAMATION STATES EMERGENCY DROUGHT RELIEF ACT OF 1991, AND FOR OTHER PURPOSES; H.R. 3189, WATER RIGHTS PROTECTION ACT

LEGISLATIVE HEARING

BEFORE THE

SUBCOMMITTEE ON WATER AND POWER

OF THE

COMMITTEE ON NATURAL RESOURCES
U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED THIRTEENTH CONGRESS

FIRST SESSION

October 10, 2013

Serial No. 113–46

Printed for the use of the Committee on Natural Resources

Available via the World Wide Web: http://www.fdsys.gov
or
Committee address: http://naturalresources.house.gov

U.S. GOVERNMENT PRINTING OFFICE

85–145 PDF WASHINGTON : 2014

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512–1800; DC area (202) 512–1800
Fax: (202) 512–2104 Mail: Stop IDCC, Washington, DC 20402–0001

COMMITTEE ON NATURAL RESOURCES

DOC HASTINGS, WA, *Chairman*
PETER A. DEFAZIO, OR, *Ranking Democratic Member*

Don Young, AK
Louie Gohmert, TX
Rob Bishop, UT
Doug Lamborn, CO
Robert J. Wittman, VA
Paul C. Broun, GA
John Fleming, LA
Tom McClintock, CA
Glenn Thompson, PA
Cynthia M. Lummis, WY
Dan Benishek, MI
Jeff Duncan, SC
Scott R. Tipton, CO
Paul A. Gosar, AZ
Raúl R. Labrador, ID
Steve Southerland, II, FL
Bill Flores, TX
Jon Runyan, NJ
Mark E. Amodei, NV
Markwayne Mullin, OK
Chris Stewart, UT
Steve Daines, MT
Kevin Cramer, ND
Doug LaMalfa, CA
Jason T. Smith, MO

Eni F. H. Faleomavaega, AS
Frank Pallone, Jr., NJ
Grace F. Napolitano, CA
Rush Holt, NJ
Raúl M. Grijalva, AZ
Madeleine Z. Bordallo, GU
Jim Costa, CA
Gregorio Kilili Camacho Sablan, CNMI
Niki Tsongas, MA
Pedro R. Pierluisi, PR
Colleen W. Hanabusa, HI
Tony Cárdenas, CA
Steven A. Horsford, NV
Jared Huffman, CA
Raul Ruiz, CA
Carol Shea-Porter, NH
Alan S. Lowenthal, CA
Joe Garcia, FL
Matt Cartwright, PA
Vacancy

Todd Young, *Chief of Staff*
Lisa Pittman, *Chief Legislative Counsel*
Penny Dodge, *Democratic Staff Director*
David Watkins, *Democratic Chief Counsel*

SUBCOMMITTEE ON WATER AND POWER

TOM MCCLINTOCK, CA, *Chairman*
GRACE F. NAPOLITANO, CA, *Ranking Democratic Member*

Cynthia M. Lummis, WY
Scott R. Tipton, CO
Paul A. Gosar, AZ
Raúl R. Labrador, ID
Markwayne Mullin, OK
Chris Stewart, UT
Doug LaMalfa, CA
Doc Hastings, WA, *ex officio*

Jim Costa, CA
Jared Huffman, CA
Tony Cárdenas, CA
Raul Ruiz, CA
Alan S. Lowenthal, CA
Peter A. DeFazio, OR, *ex officio*

CONTENTS

LEGISLATIVE HEARING ON H.R. 3176, TO REAUTHORIZE THE RECLAMATION STATES EMERGENCY DROUGHT RELIEF ACT OF 1991, AND FOR OTHER PURPOSES; H.R. 3189, WATER RIGHTS PROTECTION ACT

Thursday, October 10, 2013
U.S. House of Representatives
Subcommittee on Water and Power
Committee on Natural Resources
Washington, DC

The subcommittee met, pursuant to call, at 2:25 p.m., in room 1334, Longworth House Office Building, Hon. Tom McClintock [Chairman of the Subcommittee] presiding.

Present: Representatives McClintock, Tipton, Gosar, Stewart, Napolitano, Costa, Huffman, Lowenthal, and DeFazio.

Also Present: Representatives Bishop of Utah and Amodei.

STATEMENT OF THE HON. TOM MCCLINTOCK, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. MCCLINTOCK. The Subcommittee on Water and Power will come to order. I want to apologize to all concerned regarding the late start today. The consolation is there are no further votes scheduled, so there won't be any interruptions except from the members.

So welcome to all of you. A quorum is present. And today the Water and Power Subcommittee meets to hear two bills, one of which protects valuable private water rights from efforts by the Federal Government to expropriate those rights through what should be a routine permitting process. The other bill reauthorizes the Emergency Drought Relief Act, which provides Federal taxpayer dollars for local drought-related water projects.

H.R. 3189, the Water Rights Protection Act, is a straightforward measure to prevent the U.S. Forest Service from demanding that privately owned ski resorts surrender long-held water rights under State law as a condition of receiving special use permits for longstanding uses of public land.

Despite over 100 years of Federal deference to State law, Federal agencies have adopted the practice of demanding that water users transfer rights granted to them by States over to the Federal Government as a condition of getting a permit to operate on Federal lands. This amounts to an uncompensated taking and is a violation of both the Fifth Amendment to the Constitution and a violation of State law, under which the Federal Government must acquire water rights through the proper channels as would any other user.

There are 121 ski areas on Federal public lands, 14 of which, by the way, are on Forest Service lands in my district. These ski areas rely on privately held water rights for snowmaking, using this

water as collateral for financing to build and maintain their facilities, and for supplying water to the local communities that they support.

In 2011 the Forest Service issued a directive that would effectively take these private property rights without compensation, in violation of State law, while jeopardizing these enterprises altogether, and all of the direct employment and spinoff economic activity and tax revenues that they provide. This action illustrates an increasingly hostile attitude by this agency toward those who make productive use of our vast natural forests, in this case by enhancing and attracting the tourism upon which our mountain communities depend.

Although the principal victims of this policy have been our ski resorts, this subcommittee has also received reports of similar tactics directed against farm and ranch operations that rely on State-recognized water rights for irrigation and stock watering.

Mr. Tipton's bill simply prohibits the Federal Government from using what should be a routine permitting process to extract long-held water rights from private users. This bill seeks to restore Federal accountability and responsibility and gets the Forest Service out of what has been historically a State prerogative.

Mr. MCCLINTOCK. We will also hear H.R. 3176, the Drought Relief Act, offered by Mr. DeFazio. This measure reauthorizes a program that provides Federal money for drought relief programs. Given the disappointing rainfall last year in many parts of the country, this is an important and timely subject.

Of course the whole purpose of Federal water and power projects is to assure that there are ample supplies of water in times of drought. We will hear from the Competitive Enterprise Institute that natural processes produce some 45,000 gallons of fresh water each day for every man, woman, and child on the planet. The problem is that this abundant supply is unevenly distributed over both time and distance, which is the whole reason that we build dams and aqueducts in the first place. The more dams and aqueducts we have, the fewer water shortages we suffer. The problem is we haven't been building a lot of these projects for quite some time for reasons that this subcommittee has often discussed.

When we did build them, they were financed on the beneficiary pays principle in which Federal money fronted for these projects is repaid by the users of the water and power that these projects provide. I am interested in knowing why that principle is not applicable here and whether our approach to drought relief ought to be aimed at producing permanent abundance rather than managing temporary shortages. It is certainly an important and timely discussion to have.

Although the Federal agencies are not here today, we look forward to getting their submitted testimony and answers to many questions for the record. For those that are here, I look forward to today's testimony on how we can protect State-recognized water rights and all the many industries and uses that rely on them, and how we can better prepare for drought conditions to avoid needless expenditures of taxpayer dollars.

And with that, I am happy to yield to the Ranking Member, the gentlelady from California, Mrs. Napolitano, for 5 minutes.

STATEMENT OF THE HON. GRACE F. NAPOLITANO, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mrs. NAPOLITANO. Thank you, Mr. Chairman, and good afternoon to everybody.

Today's hearing focuses on the two bills that address important water issues in the West, H.R. 3176, the reauthorization of the Drought Relief Act, and H.R. 3189, the Water Rights Protection Act. And thank you to our witnesses for being with us even in the presence of this government shutdown.

I am proud to cosponsor H.R. 3176, legislation sponsored by my colleague, Ranking Member Peter DeFazio, which provides reclamation with the authority and flexibility to get water to entities, tribes who need it during times of drought.

Drought costs the U.S. economy between $6 billion to $8 billion annually, with 2012 drought costs possibly exceeding $35 billion. In 2013 almost 50 percent of our country is in moderate to severe drought. We will hear more of the effects of the drought in the West from the Western States Water Council witness. And may I add that many of the entities that are trying to figure out how to cope with the drought are not able do it alone.

We will also hear testimony that the Federal Government should not help the States during times of drought. That the Federal Government should not help—God help California—home to the five most productive agricultural counties in the Nation and the eighth-largest economy, with their water issues. The argument is that California's problems are not the Nation's problems. I beg to differ with that. It is not that simple. What affects California affects the rest of the Nation. That is why we are the United States of America.

H.R. 3189, offered by Representative Tipton, is legislation that seeks to address an issue between Forest Service and the ski areas in his region. The ski areas are concerned about the Forest Service interim directive that requires they transfer their water rights to the Federal Government. The Forest Service is concerned about their ability to manage the land if the ski resorts were to sell their rights. The legislation is so broadly written that it could apply to many actions on Federal lands, not just the ski resorts. So we must be careful about how unintended consequences may affect some other folks.

It is the responsibility of this committee to ensure proposed legislation receives the proper vetting. We did not receive agency testimony because of the shutdown. We don't have all the answers to the questions we have asked of the administration, again because of the shutdown. Yet this hearing is moving forward and it will be the only, and, I repeat, the only opportunity for stakeholders to weigh in before markup. We are missing key information, without the administration's position on these bills and our ability to question them directly.

This is not the best way to do business, nor is it the best way to ensure that the legislation we pass serves the best interest of our taxpayers and our American public. The best way we can help our communities with their water challenges is to reopen the Federal Government, and we must focus on bringing government back

to work so employees of not only the U.S. Geological Survey, but other critical agencies, can work and be participants and comment on our issues.

Because of the government shutdown, only 43, and, I repeat, only 43 people out of 8,623 USGS employees—that is less than half of 1 percent—are at work. We must bring back 3,311 of the 5,077 reclamation employees that have been furloughed and are waiting to go back to work for our country.

Next year is expected to be a very dry water year and we need them all back in their jobs to help plan for our future and to help our Nation's not only Ag economy, but the rest of our Nation. It is ironic, though, that it takes the absence of these employees to value their presence. They are essential to this country and to the legislative process, and we need them back at work.

As we consider these important pieces of legislation we must first prioritize reopening government. We must vote on a clean resolution, continuing resolution, with no add-ons, I mean none, clean; open the Federal Government and put people back to work. Let us work for our citizens because that is what they sent us here to do.

And, Mr. Chairman, I would like to submit for the record three letters of support, from the Association of California Water Agencies, the Family Farm Alliance, and the Western States Water Council, associated with the Western Governors' Association.

Mr. MCCLINTOCK. Without objection.

[The letters submitted for the record by Mrs. Napolitano follow:]

LETTERS SUBMITTED FOR THE RECORD BY REPRESENTATIVE NAPOLITANO

ASSOCIATION OF CALIFORNIA WATER AGENCIES,
SACRAMENTO, CA 95814,
OCTOBER 4, 2013.

Hon. TOM MCCLINTOCK, *Chairman*,
Hon. GRACE NAPOLITANO, *Ranking Member*,
House Subcommittee on Water and Power,
Washington, DC 20515.

DEAR CHAIRMAN MCCLINTOCK AND RANKING MEMBER NAPOLITANO:

The Association of California Water Agencies is pleased to support H.R. 3176, Reauthorization of the Reclamation States Emergency Drought Relief Act of 1991. ACWA's 450 public water agency members supply over 90 percent of the water delivered in California for residential, agricultural, and industrial uses.

The Drought Relief Act provides the Bureau of Reclamation with the tools it needs to help states plan for and mitigate the impacts of droughts. As you are aware, California is currently facing drought conditions and the forecast for 2014 is not looking good. ACWA believes programs like this will help water managers during this time of drought.

ACWA appreciates your work on this legislation. If we can be of any assistance, please feel free to contact our Washington office at 202.434.4760.

Sincerely,

DAVID REYNOLDS,
Director of Federal Relations.

FAMILY FARM ALLIANCE,
KLAMATH FALLS, OR 97601,
OCTOBER 4, 2013.

Hon. TOM MCCLINTOCK, *Chairman*,
Hon. GRACE NAPOLITANO, *Ranking Member*,
House Subcommittee on Water and Power,
1522 Longworth House Office Building,
Washington, DC 20515.

Re: Support for H.R. 3176

DEAR CHAIRMAN MCCLINTOCK AND RANKING MEMBER NAPOLITANO:

On behalf of the Family Farm Alliance, I write to show our strong support for H.R. 3176, "Reauthorization of the Reclamation States Emergency Drought Relief Act of 1991".

The Family Farm Alliance is a grassroots organization of family farmers, ranchers, irrigation districts and allied industries in 17 Western states. Many of our members throughout this area have benefited from the Drought Relief Act in the past to help drill wells, install temporary pipelines and haul water during drought periods.

The Drought Relief Act provides the Bureau of Reclamation with the tools it needs to help states plan for and mitigate the impacts of droughts. With historic drought conditions on the Colorado River, and grim water challenges facing our members in California, Idaho, Oregon and elsewhere, the Alliance believes programs like this will help water managers during this time of drought.

Thank you for your work on this legislation. If we can be of any assistance, please do not hesitate to call me at 541–892–6244 or dankeppen@charter.net.

Sincerely,

DAN KEPPEN,
Executive Director.

WESTERN STATES WATER COUNCIL
SAN ANTONIO, TEXAS
OCTOBER 12, 2012

POSITION NO. 347

POSITION OF THE WESTERN STATES WATER COUNCIL REGARDING REAUTHORIZATION OF THE RECLAMATION STATES EMERGENCY DROUGHT RELIEF ACT

WHEREAS, the Western States Water Council is a policy advisory body representing eighteen states affiliated with the Western Governors' Association; and

WHEREAS, since 1976, the Council has been actively involved in national drought preparedness, planning and response, as well as related policy development and implementation; and

WHEREAS, in 2012 severe to extreme drought conditions exist throughout much of the western and central parts of the U.S., covering an area amounting to about two-thirds of the Nation; and

WHEREAS, drought has been, is, and will be an ongoing fact of life in the relatively arid West; and

WHEREAS, the Reclamation States Emergency Drought Relief Act of 1991 (43 U.S.C. 2214(c)) and subsequent reauthorization through Fiscal Year 2012 has expired; and

WHEREAS, Title I provided the Bureau of Reclamation with authority for construction, management, and conservation measures to alleviate the adverse impacts of drought, including mitigation of fish and wildlife impacts, and provided Reclamation with the flexibility to meet contractual water deliveries by allowing acquisition of water to meet requirements under the Endangered Species Act, benefiting contractors at a time when they are financially challenged; and

WHEREAS, additionally, Title I authorized Reclamation to participate in water banks established under state law, facilitate water acquisitions between willing buyers and willing sellers, acquire conserved water for use under temporary contracts, make facilities available for storage and conveyance of project and non-project water, make project and non-project water available for nonproject uses, and acquire water for fish and wildlife purposes on a non-reimbursable basis; and

WHEREAS, Title I also allowed Reclamation, as a "last resort," to help smaller, financially strapped towns, counties, and tribes without the financial capability to deal with the impacts of drought; and

WHEREAS, Title II authorized Reclamation to prepare or participate in the preparation of cooperative drought contingency plans for the prevention or mitigation of adverse effects of drought conditions; and

WHEREAS, Title II authorized Reclamation to conduct studies to identify opportunities to conserve, augment, and make more efficient use of water supplies available to Federal Reclamation projects and Indian water resource developments in order to be prepared for and better respond to drought conditions; and

WHEREAS, Title II authorized the Secretary of the Interior to study establishment of a Reclamation Drought Response Fund to be available for defraying those expenses which the Secretary determined necessary to implement drought plans prepared under the Act, and to make loans for nonstructural and minor structural activities for the prevention or mitigation of the adverse effects of drought; and

WHEREAS, there is a continuing need for authority allowing Reclamation the flexibility to continue delivering water to meet authorized project purposes, meet environmental requirements, respect state water rights, work with all stakeholders, and provide leadership, innovation, and assistance; and

WHEREAS, proposed legislative action would reauthorize the Act through 2017, and raise the limit on authorized appropriations.

NOW THEREFORE BE IT RESOLVED, that the Western States Water Council strongly supports legislation to reauthorize the Reclamation States Emergency Drought Relief Act.

Mrs. NAPOLITANO. And my last plea is that I would respectfully request that we wait to move any of these bills until our government is open and we can hear from the agency that is supposed to be here.

Thank you, Mr. Chair. And I yield back.

Mr. MCCLINTOCK. Thank you. Before we proceed the Chair would ask unanimous consent that Mr. Bishop of Utah and Mr. Amodei of Nevada be allowed to sit with the subcommittee and participate in the hearing. Hearing no objection, so ordered.

It is customary for us to recognize any other members who wish to make opening statements. And the Chair is now pleased to recognize Mr. Tipton of Colorado for 5 minutes.

STATEMENT OF THE HON. SCOTT R. TIPTON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF COLORADO

Mr. TIPTON. Thank you, Chairman McClintock, for convening today's hearing, and thank you for your support and engagement working with me on this critical issue. I would also like to thank Mr. Bishop, Mr. Amodei, Mrs. Lummis, Mr. Gosar, Mr. Simpson, Mr. Coffman, and Mr. Polis, who have all joined in this bipartisan effort and continue to work with me to safeguard Western water rights. Finally, I want to thank David Corbin and Glenn Porzak from Colorado and Randy Parker from Utah for making the trip to DC to be able to testify on behalf of the Water Rights Protection Act.

Recent Federal attempts to manipulate Federal permit lease and land management process to circumvent long-established State water law and hijack privately held water rights have sounded the alarm for all non-Federal water users that rely on these water rights for their livelihood. The most recent case of the Federal Government's overreach and infringement on private property rights, which we will discuss today in the hearing, involves the U.S. Forest Service attempt to require the transfer of privately held water

rights to the Federal Government as a permit condition on our National Forest System lands.

There is no compensation for the transfer of these privately held water rights, despite the fact that many stakeholders have invested millions of their own capital in developing them. This Forest Service permit condition has already hurt a number of stakeholders in my home State of Colorado, including the Powder Horn ski area in Grand Junction and the Breckenridge ski area resort. Despite having been excellent stewards of the environment and their water rights, the Forest Service has demanded the relinquishment of State grant of water rights from these ski areas in order to continue their operations.

These same nefarious tactics have been used in Utah, Nevada, and other Western States where agencies have required surrender of possession of water rights in exchange for approving the conditional use of grazing allotments. This Federal water grab has broad implications that have begun to extend beyond recreation and farming and ranching communities and are now threatening municipalities and other businesses.

To add insult to injury, the Forest Service claims, remarkably with a straight face, that it is implementing these Federal agency permit conditions to prevent water rights from being sold off and/or used improperly. However, according to the Chief Forest Service Officer, Tom Tidwell, comments made in this very committee, there have never been any cases where privately held rights have been used improperly. Furthermore, the language of the Forest Service's water clause offers no guarantee that the Forest Service could not divert water to other locations or direct water for other purposes altogether.

As a result of the efforts that began in October of 2011 and encompass testimony from several hearings, conversations, and with numerous stakeholders across Colorado and the West, close collaboration with my friends on this committee, I introduce the bipartisan Water Rights Protection Act. This legislation provides critical protection for water rights and holders from Federal takings by ensuring that the Federal Government agencies cannot extort private property rights through unevenhanded negotiations.

The Water Rights Protection Act offers a sensible approach that preserves water rights and the ability to be able to develop water requisite to living in the arid West. This is without interfering with water allocations for non-Federal parties or allocations that protect the environment cherished by all Westerners.

As could be expected of the West-wide legislation that seeks to protect all water users from the relentless efforts of the Federal Government to extort non-Federal water rights, this bill is work in progress. I look forward to continuing to work with my colleagues from other Western States to ensure that no State-recognized water right goes unprotected from the class actions this bill prohibits.

To this end, the brief two-page bill prohibits Federal agencies from pilfering water rights through the use of permits, leases, and other land management arrangements which would otherwise have to pay just compensation under the Fifth Amendment of the Constitution. The bill also prohibits Federal land management agencies

from forcing water users to apply or acquire rights for the United States rather than for the water users themselves.

Finally, this commonsense legislation provides certainty by upholding the longstanding Federal deference to State water law on which countless water users rely. The Water Rights Protection Act has already received endorsements of the American Farm Bureau Federation, the Associated Governments of Northwest Colorado, the California Ski Area Association, CLUB 20, the Colorado River Water Conservation District, Colorado Ski Country USA, the Colorado Water Congress, the National Cattlemen's Beef Association, National Ski Areas Association, the Pacific Northwest Ski Area Association, and the Southwestern Water Conservation District. Mr. Chairman, I would like to be able to submit for the record their letters of support.

Mr. MCCLINTOCK. Without objection.

Mr. TIPTON. Thank you, Mr. Chairman.

And further, we just received a letter of support that came in from the Family Farm Alliance for the record as well. Their testimony supports my bill and indicates that more water storage is a long-term solution to the drought.

Mr. MCCLINTOCK. Also without objection.

[The letters submitted for the record by Mr. Tipton follow:]

LETTERS SUBMITTED FOR THE RECORD BY REPRESENTATIVE TIPTON

AMERICAN FARM BUREAU FEDERATION,
WASHINGTON, DC 20024,
OCTOBER 4, 2013.

Hon. SCOTT TIPTON,
Hon. JARED POLIS,
House Subcommittee on Water and Power,
Washington, DC 20515.

DEAR REPRESENTATIVES TIPTON AND POLIS:

On behalf of more than 6 million Farm Bureau member families across the United States, I commend you for your introduction of H.R. 3189, *the Water Rights Protection Act*. The American Farm Bureau Federation endorses the Tipton-Polis bill, and will work closely with you to broaden bipartisan support for this measure and to gain its swift consideration and approval by the House of Representatives.

H.R. 3189 grants no new rights to any party, nor does it in any way infringe on existing rights of individuals, states or the Federal Government. This legislation simply reaffirms what has been existing law for generations and which is expressed in numerous places in Federal law, including the Mining Act of 1866; the 1897 Organic Act establishing the U.S. Forest Service; the Taylor Grazing Act; and the Federal Land Policy and Management Act of 1976.

There is no provision in Federal law authorizing or permitting the Forest Service or the Bureau of Land Management to compel owners of lawfully acquired water rights to surrender those rights or to acquire them in the name of the United States. Thus, H.R. 3189 does nothing more than assure holders of BLM or Forest Service permits that their lawfully acquired rights will not be abridged and that Federal agencies may not unlawfully use the permit process to acquire rights they do not currently possess.

We look forward to working with you on this important legislation and again commend you for your leadership in this important area.

Sincerely,

BOB STALLMAN,
President.

ASSOCIATED GOVERNMENTS OF NORTHWEST COLORADO

RESOLUTION TO SUPPORT THE WATER RIGHTS PROTECTION ACT H.R. 3189

WHEREAS, The United States Forest Service (USFS) recently attempted to condition the issuance of a use permit on the permit applicant's transfer of privately held water rights to the USFS; and

WHEREAS, Federal land management agencies are using coercion to acquire private water rights by requiring that water users seeking to operate on Federal land apply for water rights under the name of the United States rather than the name of the purchaser; and

WHEREAS, These and related actions constitute a Federal taking of private property without just compensation, in violation of the Takings Clause of the Fifth Amendment of the United States Constitution; and

WHEREAS, These actions are also in violation of long established state water laws; and

WHEREAS, These actions have already had a negative impact on local ski businesses, which are important contributors to our regional economy; and

WHEREAS, Many municipalities and agricultural operations in our region have water storage facilities similar to those owned by the ski resorts, and could therefore be subject to a similar taking; and

WHEREAS, These and similar actions could be used against other important industries in our region, including, but not limited to, agriculture and energy development; and

WHEREAS, The majority of Colorado's absolute and conditional water rights originate on federally controlled land, and could be subject to a similar taking at any point in the future; and

WHEREAS, The Water Rights Protection Act, H.R. 3189, would protect communities, businesses, family farms, and other stakeholders in northwest Colorado that rely on privately held water rights from having these property rights taken by any agency of the Federal Government,

BE IT THEREFORE RESOLVED, that the Associated Governments of Northwest Colorado (AGNC) fully support H.R. 3189, the Water Rights Protection Act; and

BE IT FURTHER RESOLVED, that the AGNC will furnish a letter to any and all interested parties, attesting to our support of this Act.

CALIFORNIA SKI INDUSTRY ASSOCIATION,
MILL VALLEY, CA,
OCTOBER 4, 2013.

Hon. DOC HASTINGS, *Chairman*,
House Natural Resources Committee,
1324 Longworth House Office Building,
Washington, DC 20515.

Re: Support for H.R. 3189

DEAR CHAIRMAN HASTINGS:

On behalf of the members and directors of the California Ski Industry Association I am writing to add our support to H.R. 3189, the Water Rights Protection Act.

This narrowly focused bill is designed to resolve an unfair regulation requiring Forest Service permittees to cede, without compensation, their water rights to the agency. Nineteen of California's twenty-six ski areas operate on Forest Service lands. We have a long history of working with the agency and will continue to do so in the future. However, our winter sports facilities on Federal lands are strongly opposed to the clauses that would require California permittees to cede their valuable water rights to the agency without compensation, Such clauses represent a taking and carry far-reaching legal and economic implications, not only for our industry but also for all other permittees operating on Forest Service lands.

A recent study by San Francisco State University reported that California's winter sports resorts generate $1.3 billion in economic activity and over 16,000 Jobs in our mountain communities. Our resorts have millions of dollars invested in their water rights. In many cases the source of these rights are located outside of the permit boundaries.

We appreciate your scheduling a hearing on H.R. 3189 and thank you and the sponsors of this important legislation.

Sincerely,

BOB ROBERTS,
President & CEO.

CLUB 20,
GRAND JUNCTION, CO 81502,
OCTOBER 8, 2013.

Hon. SCOTT TIPTON,
House Subcommittee on Water and Power,
218 Cannon House Office Building,
Washington, DC 20515.

Re: CLUB 20 strongly urges Congressional support and passage of H.R. 3189, known as the "Water Rights Protection Act"

DEAR CONGRESSMAN TIPTON:

CLUB 20 is a 60-year-old coalition of businesses, individuals and local governments with members representing 22 counties west of the Continental Divide in Colorado. Our members have been coming together over the past six decades to discuss matters of common concern to Western Colorado communities and citizens. Water has often been a focal point for CLUB 20 members as there are far reaching implications to many of the industries, communities and residents on the West Slope regarding privately held water rights in the region.

Water rights are considered private property under Colorado water law and are managed under a strict system that has served the state over time. For many years, CLUB 20 policy has opposed, ". . . any Federal requirement that permittees assign water rights to the United States in order to obtain, renew or modify Federal permits." CLUB 20 understands that the McCarran Amendment requires the Federal Government, when requested, to adjudicate any water rights it requires under the substantive and procedural elements of state water law within the state of the desired rights.

Our members have openly opposed and. continue to oppose the efforts of the U.S. Forest Service (USFS) to unilaterally require ski areas or agriculture producers to turn over their privately held water rights to the USFS as a condition of obtaining, modifying or renewing a permit to conduct ski area activities or maintain infrastructures to convey water on USFS lands. We further oppose any such provision or ruling that may apply to other private water rights with regard to, natural resource development interests or other domestic water interests.

The explanation offered by the USFS for the "taking" of these privately held water rights, often developed at great expense to the owner, is that they wish to maintain the designated use of the water for the permit. We find that explanation disingenuous for the following reasons:

1. Requiring that the USFS be named the owner of valid, existing water rights is taking a private property right without compensation and appears to be a violation of the Fifth Amendment to the U.S. Constitution.
2. It would appear that Federal ownership of these water rights could be used to disallow future use of the area as a ski area or other designated enterprise because the agency that holds title to the water rights could deny permits based on their withholding of those same water rights.
3. Once promulgated by the USFS regarding ski area and agriculture water rights, similar decisions could be made regarding grazing rights, mining rights, milling rights, energy rights even municipal water rights.
4. This effort by the Federal Government seeks to undermine states' rights with regard to water management, which our members find unacceptable.

Ski area and agriculture operators invest significant amounts of capital to develop their operations; in order to attract the investment capital necessary, they must show that they have adequate ability to construct and operate the facility. Without demonstrating that they have adequate water rights, attracting capital will be difficult if not impossible. Further, it has been shown time after time that Federal regulations can be, and are, routinely modified for one reason or another creating uncertainty for developers of all sorts on public lands. Once held in the name of the USFS, there is no guarantee that these water rights won't be redirected, withheld

or otherwise made unavailable to those who made significant investments in developing those rights.

We support the protections inherent in H.R. 3186 and urge passage of this or similar legislation which accomplishes the same purpose. Thank you for addressing this critical issue through the legislative process; we look forward to working with you to see this bill through the process.

Sincerely,

BONNIE PETERSEN,
Executive Director.

COLORADO RIVER DISTRICT,
GLENWOOD SPRINGS, CO 81602,
OCTOBER 9, 2013.

Hon. SCOTT TIPTON,
House Subcommittee on Water and Power,
218 Cannon House Office Building,
Washington, DC 20515.

Re: H.R. 3189

DEAR CONGRESSMAN TIPTON:

The Colorado River Water Conservation District sincerely appreciates your leadership in Colorado and Western water matters. H.R. 3189 is just one more example. The Colorado River District will recommend that its Board support H.R. 3189 with the consensus amendments developed by your staff, the national ski areas and the River District.

With the clarifying amendments, H.R. 3189 provides responsible side boards to agency actions when permitting allowable activities and uses on Federal lands. It prohibits the transfer of ownership of privately held water rights in exchange for required permits. We are also pleased that your staff will prepare a sponsor's statement to confirm that the bill will not change existing law that allows reasonable permit conditions that can protect both the natural environment and present and future downstream water users dependent on the forest for critical water supplies.

I want to express my genuine appreciation for your and your staff's willingness to work with us on language that accomplishes our mutual goals of protecting private property interests in western water while maintaining the authority to condition permits to ensure responsible exercise of those rights.

Sincerely,

R. ERIC KUHN,
General Manager.

COLORADO SKI COUNTRY USA,
DENVER, CO,
OCTOBER 4, 2013.

Hon. DOC HASTINGS, *Chairman*,
House Natural Resources Committee,
1324 Longworth House Office Building,
Washington, DC 20515.

DEAR CHAIRMAN HASTINGS:

I am writing on behalf of Colorado Ski Country USA (CSCUSA), the industry association and global voice of skiing and snowboarding in Colorado, in support of H.R. 3189, the Water Rights Protection Act. CSCUSA represents 20 ski areas in Colorado that operate on National Forest System lands under a special use permit from the U.S. Forest Service. These public land resorts hosted over 6.3 million skier visits in Colorado in the 2012/13 ski season alone, and skiing and snowboarding constitute a $3.0 billion annual economic impact to our state.

CSCUSA supports H.R. 3189 because it would prohibit the U.S. Forest Service from requiring our resorts to transfer valuable water rights to the Forest Service as a condition of receiving a permit, or to apply for water rights in the name of the United States, without compensation.

While the Forest Service insists that such actions would be intended only to maintain the long-run viability of the resorts as ski and snowboard areas, requiring resorts to transfer the water rights they need to operate so as to prevent their sale to a third party is a solution in search of a problem. Moreover, required transfers of water rights that are critical to ski area operations would politicize their use, with each change in administration changing priorities for water use.

Furthermore, requiring transfer of valuable water rights to the NFS as a condition of receiving a permit raises serious Fifth Amendment concerns. Our member resorts' water rights were acquired and developed at great expense pursuant to Colorado law, and in some cases predate the Forest Service itself. If the NFS wants to secure its own water rights, it should buy them on Colorado's well-regulated water market like everyone else.

Thank you for scheduling a hearing on H.R. 3189 and for your leadership on this issue. It means a great deal to CSCUSA and our member ski resorts operating across Colorado on NFS lands.

Sincerely,

MELANIE MILLS
President and CEO.

COLORADO WATER CONGRESS,
DENVER, CO 80203,
OCTOBER 9, 2013.

Hon. SCOTT TIPTON,
House Subcommittee on Water and Power,
Washington, DC 20515.

Re: Colorado Water Congress Supports H.R. 3189, Water Rights Protection Act

DEAR CONGRESSMAN TIPTON:

The Colorado Water Congress is pleased to see the introduction of and hearing for Water Rights Protection Act (WRPA), H.R. 3189. The bipartisan bill was introduced last week. This legislation, with the consensus amendments developed by your office, the national ski areas and Colorado water users would prohibit the conditioning of any permit, lease, or other use agreement on the transfer or surrender of any water right to the United States by the Secretaries of Interior or Agriculture.

The issue is of particular importance to Colorado's ski areas that are located in national forests. The U.S. Forest Service, through a 2012 Interim Directive recently attempted to require the transfer of privately owned water rights on Federal lands to the Federal Government as a condition of issuing standard land use permits.

The National Ski Areas Association sued the Forest Service alleging that the directive amounts to a taking of private property rights without due compensation and asked for a declaration that the Forest Service cannot condition a ski area special use permit on the assignment or severance of water rights. In December 2012, the Federal district court entered an injunction prohibiting the Forest Service from enforcing the directive. The court found that the Forest Service violated Federal procedural laws in adopting the directive.

This matter is of importance to the Colorado legislature that as recently as late August 2013 continues to investigate Forest Service activities in this regard. It is unfortunate that Colorado water users have to had to pursue both litigation and legislation to protect our water rights from takings by our Federal Government.

We hope that passage of H.R. 3189 will put us on the right path toward a permanent resolution. We urge the House to pass this legislation without delay.

The Colorado Water Congress supports H.R. 3189. Thank you for sponsoring the bill.

Sincerely,

DOUGLAS KEMPER,
Executive Director.

FAMILY FARM ALLIANCE,
KLAMATH FALLS, OR 97601,
OCTOBER 8, 2013.

Hon. SCOTT TIPTON,
House Subcommittee on Water and Power,
218 Cannon House Office Building,
Washington, DC 20515.

Re: Support for "Water Rights Protection Act" (H.R. 3189)

DEAR CONGRESSMAN TIPTON:

On behalf of the Family Farm Alliance, this letter expresses our formal support for your "Water Rights Protection Act" (H.R. 3189). This important legislation would prohibit the conditioning of any Federal permit, lease, or other use agreement on the transfer, relinquishment, or other impairment of any water right to the United States by the Secretaries of the Interior and Agriculture.

The Alliance is a grassroots organization of family farmers, ranchers, irrigation districts and allied industries in 16 Western states. The Alliance is focused on one mission: To ensure the availability of reliable, affordable irrigation water supplies to Western farmers and ranchers. The Alliance has long advocated that solutions to conflicts over the allocation and use of water resources must begin with recognition of the traditional deference to state water allocation systems. Federal agencies must recognize and respect state-based water rights and develop their management decisions according to state law and abide by state decrees defining both Federal and non-Federal rights. Federal agencies need to work within the framework of existing prior appropriation systems instead of attempting to fashion solutions which circumvent current water rights allocation and administration schemes.

Unfortunately, in recent years, some agencies within the Federal Government have repeatedly demonstrated they will not abide by this philosophy. These efforts constitute a Federal overreach and a violation of private property rights.

For example, the U.S. Forest Service (USFS) has attempted to implement a permit condition that requires the transfer of privately held water rights to the Federal Government as a permit condition on National Forest System lands. There is no compensation for the transfer of these privately held rights despite the fact that many stakeholders have invested their own capital in developing the rights. Additionally, Federal land management agencies are leveraging Western water users in an effort to acquire additional water supplies for the Federal Government by requiring water users to apply for their rights under state law in the name of the United States rather than for themselves. USFS continues to take private water rights hostage through their permit conditions, despite objections from elected officials, business owners, private property advocates and a U.S. District Court ruling.

Our farmers and ranchers rely on their vested water rights to secure operating loans, as well as irrigate crops and water livestock. Federal agencies should not be able to leverage those water rights against farming and ranching families who have long depended upon Federal permits and leases to support actions like grazing.

The Water Rights Protection Act would protect communities, businesses, recreation opportunities, farmers and ranchers as well as other individuals that rely on privately held water rights for their livelihood from Federal takings. It would do so by prohibiting Federal agencies from extorting water rights through the use of permits, leases, and other land management arrangements, for which it would otherwise have to pay just compensation under the Fifth Amendment of the Constitution. The Water Rights Protection Act protects privately held water rights, prohibits Federal takings, and upholds state water law by:

- Prohibiting agencies from implementing a permit condition that requires the transfer of privately held water rights to the Federal Government in order to receive or renew a permit for the use of land;
- Prohibiting the Secretary of the Interior and the Secretary of Agriculture from requiring water users to acquire rights for the United States rather than for the water user themselves;
- Upholds longstanding Federal deference to state water law;
- Has no cost to the American taxpayer.

Some Family Farm Alliance members in Arizona and Colorado have expressed some concerns with language contained in the original bill. We understand that they are working with you and Rep. Gosar to modify the language so that changes can be easily made by the Water and Power Subcommittee. We support H.R. 3189 with those changes.

Thank you for this opportunity to provide support for your bill, which is very important to the family farmers and ranchers of our membership. If you have any questions about this letter, I encourage you or your staff to contact me at (541)–892–6244.

Sincerely,

DAN KEPPEN,
Executive Director.

NATIONAL CATTLEMEN'S BEEF ASSOCIATION,
WASHINGTON, DC 20004,
OCTOBER 3, 2013.

Hon. DOC HASTINGS, *Chairman*,
Hon. PETER DEFAZIO, *Ranking Member*,
House Natural Resources Committee,
Washington, DC 20515.

Re: Support of the Water Rights Protection Act (H.R. 3189)

DEAR CHAIRMAN HASTINGS AND RANKING MEMBER DEFAZIO:

The Public Lands Council (PLC) and the National Cattlemen's Beef Association (NCBA) strongly support the *Water Rights Protection Act* (WRPA) (H.R. 3189). PLC is the only national organization dedicated solely to representing the roughly 22,000 ranchers who operate on Federal lands, some of which are U.S. Forest Service (USFS) lands. NCBA is the beef industry's largest and oldest national marketing and trade association, representing American cattlemen and women who provide much of the nation's supply of food and own or manage a large portion of America's private property. Many of our members also hold private water rights on Federal lands, which serve as an integral part of their operations; thus, these water rights keep our members in business and rural communities thriving. However, landowners face an unprecedented threat to the future of their water rights on lands managed by the USFS.

The USFS has been notorious for violating private property rights, as they have recently attempted to require the transfer of privately owned water rights to the Federal Government. The USFS has not provided adequate compensation as required by Article V of the Constitution; instead, they have attempted to acquire these rights in exchange for special use permits, likely in violation of a recent Supreme Court ruling in Koontz. Furthermore, the USFS has repeatedly ignored established state water laws in order to perform these takes, which amounts to a vast overreach by the Federal Government.

H.R. 3189, introduced by Congressmen: Scott Tipton (R-Colo.), Mark Amodei (R-Nev.), Rob Bishop (R-Utah), Tom McClintock (R-Calif.), and Jared Polis (D-Colo.) comes as a means to combat the recent directive that allows the USFS to execute the seizure of these water rights without just compensation. The language in the directive is applicable to ski areas specifically; however, this issue is a threat to all water users, including ranchers, as they depend on these rights to keep their business viable.

This legislation would prohibit the Secretary of the Interior and the Secretary of Agriculture from, requiring the transfer of water rights without adequate compensation. Additionally, the bill supports long-established state water laws, clarifying that the Federal Government does not have jurisdiction.

We strongly encourage the Natural Resource Committee to support this important legislation. We thank you for your attention to this crucial issue, and for supporting our members as they continue to be an essential part of rural communities and stewards of our public lands.

Sincerely,

SCOTT GEORGE,
NCBA President.

BRICE LEE,
PLC President.

NATIONAL SKI AREAS ASSOCIATION,
LAKEWOOD, CO,
OCTOBER 4, 2013.

Hon. DOC HASTINGS, *Chairman*,
House Natural Resources Committee,
1324 Longworth House Office Building,
Washington, DC 20515.

Re: Support for H.R. 3189

DEAR CHAIRMAN HASTINGS:

I am writing on behalf of the National Ski Areas Association (NSAA) in support of H.R. 3189, the Water Rights Protection Act. NSAA represents 121 ski areas in the U.S. that operate on National Forest System lands under a special use permit from the U.S. Forest Service. These public land resorts accommodate the majority of skier visits in the U.S. and are located in the states of Arizona, California, Colorado, Idaho, Montana, Nevada, New Hampshire, New Mexico, Oregon, Utah, Vermont, Washington and Wyoming. The ski industry generates $12.2 billion in economic activity annually and is a major employer in rural economies. NSAA would like to thank the lead sponsors of this bill, Representatives Tipton, Polis, Amodei and McClintock, for their leadership on this critical issue for ski areas.

NSAA supports H.R. 3189 because it would prohibit the Forest Service from issuing permit clauses that require ski areas to transfer ownership of valuable water rights to the United States, or apply for water rights in the name of the United States, without compensation. Water is crucial to ski area operations. Ski areas collectively hold water rights worth over a hundred million dollars. We developed these rights through our own effort and expense, and we have no intention of surrendering ownership of these water rights to the U.S. without compensation.

This bill would prevent the Federal Government from making an end run around state law by merely taking water rights that it does not own through its permitting authority. It would not only protect ski area water rights—it would protect any water rights owners that operate on Federal land.

In closing, we would like to thank you for scheduling a hearing on H.R. 3189 and for your leadership on this issue. It means a great deal to NSAA and all ski areas across the country operating on NFS lands.

Sincerely,

MICHAEL BERRY,
President.

PACIFIC NORTHWEST SKI AREAS ASSOCIATION,
LA CONNER, WA 98257,
SEPTEMBER 26, 2013.

Hon. DOC HASTINGS, *Chairman*,
House Natural Resources Committee,
1324 Longworth House Office Building,
Washington, DC 20515.

Re: H.R. 3189/Water Rights Protection Act

DEAR CHAIRMAN HASTINGS:

I am writing on behalf of ski areas in the Pacific Northwest operating on National Forest System lands. PNSAA represents 34 ski resorts in Washington, Oregon, Alaska, Idaho, Montana and California. Of the 34 members 30 operate on public land.

PNSAA supports H.R. 3189/Water Rights Protection Act that would prohibit the Forest Service from issuing permit clauses that require ski areas to transfer ownership of valuable water rights to the United States without compensation. Water is crucial to ski area operations. Ski areas collectively hold water rights worth over a hundred million dollars. We developed these rights through our own effort and expense, and we have no intention of surrendering ownership of these water rights to the U.S. without compensation.

We would like to thank you for your leadership on protecting ski area water rights. It means a great deal to PNSAA and all ski areas across the country operating on NFS lands.

Sincerely,

JOHN A. GIFFORD,
President.

THE SOUTHWESTERN WATER CONSERVATION DISTRICT,
DURANGO, CO 81301,
OCTOBER 10, 2013.

Hon. SCOTT TIPTON,
House Subcommittee on Water and Power,
218 Cannon House Office Building,
Washington, DC 20515.

DEAR CONGRESSMAN TIPTON:

On behalf of the Southwestern Water Conservation District ("District"), we thank you for sponsoring the *Water Rights Protection Act*, H.R. 3189. This vital bipartisan bill would prohibit the conditioning of any permit, lease, or other use agreement on the transfer, relinquishment, or other impairment of any water right to the United States by the Secretaries of the Interior or Agriculture.

The Southwestern Water Conservation District (SWCD) was established by the Colorado legislature to conserve and protect the waters of the San Juan and Dolores Rivers and their tributaries. Therefore, we see it as our statutory obligation to safeguard privately held water rights in the region and uphold the primacy of state water law, as H.R. 3189 would do.

The U.S. Forest Service has recently attempted to require the transfer of privately held water rights to the Federal Government as a condition of acquiring a National Forest System lands permit. The District considers such requirements tantamount to a Federal taking, and applauds H.R. 3189's prohibition of such conditions,

The District encourages the House of Representatives to pass this legislation without delay.

We thank you for introducing the *Water Rights Protection Act* and for your leadership on this issue of great consequence.

Sincerely,

BRUCE WHITEHEAD,
Executive Director.

Mr. TIPTON. My hope is that today's hearing further strengthens the bipartisan efforts to be able to protect local water rights from the Federal Government and their overreach and takings. I appreciate the opportunity to discuss this important legislation, and I, along with the Ranking Member, do look forward to the Federal Government trying to justify taking Western water rights.

With that, Mr. Chairman, I yield back.

Mr. MCCLINTOCK. Thank you. The Chair is now pleased to recognize Mr. DeFazio for 5 minutes.

STATEMENT OF THE HON. PETER A. DEFAZIO, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OREGON

Mr. DEFAZIO. Thank you, Mr. Chairman. Mr. Chairman, thanks for the hearing today on 3176. I appreciated being put on the agenda. I want to thank the Western States Water Council for coming to DC to testify, especially at this odd time of government shutdown.

It does two simple things. It reauthorizes the 1991 Reclamation States Emergency Act for an additional 5 years, until 2018. It gives

BuRec the flexibility to expedite water transfers between projects, move nonproject water on Federal facilities, construct temporary structures and wells during times of drought. These are not long-term solutions, but they are sometimes required to mitigate these episodic events of drought.

It also authorizes Reclamation to assist in drought contingency planning with all 50 States, tribes, and territories. The Drought Relief Act is by no means a solution, a total solution, but I believe it is an authority that is vital to BuRec when they are turned to as a last resort in times of emergency. But the second authority here, drought contingency planning, could also go to some of the issues raised earlier about storage and other things.

Second, we are hearing 3189. Obviously, whenever you begin to discuss water rights and water law in the West it is incredibly emotional, it is something that is unbelievably complicated within and across State borders and not easily understood. I don't know what the Forest Service was attempting to do in its first directive, which I believe was overly broad and didn't seem to distinguish between water rights which might be actual, existing within the leasehold or the ski area itself that pertained to the Federal land or those which were acquired from offsite by the operator. It was thrown out by the courts mostly on procedural grounds, but I think in the interim they did hear concerns, they were in the process of developing a new directive, which unfortunately we won't be able to hear about today, and it was supposed to come out next month for a period of public comment, and that probably will be allowed.

I look forward to an opportunity to have that discussion. I am concerned that the legislation as drafted would seem to go far beyond protecting the rights of the ski operators who are probably the object of this unknown new directive, but we don't know that exactly either, but it applies to all actions requiring a permit on Federal lands. You know, what does that mean for grazing? I don't quite understand the full implications of that. What would it mean for oil and gas development? Fracking takes a lot of water. There are some very serious issues there. There is fracking, a tremendous amount of fracking on private land, but there are also applications pending in areas of Federal land.

So I think it could go very, very far beyond and have unintended consequences given the way it is broadly written. I appreciate that the author said it was a work in progress, and I think there are legitimate rights to be protected here and want to work to protect those, but I don't want to overreach either. So hopefully we won't move forward until we have an opportunity with a restored government to have the Forest Service come in and explain its new directive and see if that doesn't do what we think it needs to do, then take more targeted action.

Thank you, Mr. Chairman.

Mr. MCCLINTOCK. Thank you.

[The prepared statement of Mr. DeFazio follows:]

PREPARED STATEMENT OF RANKING MEMBER PETER DEFAZIO, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OREGON

Good afternoon and thank you for including H.R. 3176 as part of today's agenda. I especially would like to thank the Western States Water Council for coming to DC to testify on this legislation, especially in light of the government shutdown.

My legislation reauthorizes the 1991 Reclamation States Emergency Act for an additional 5 years until 2018. This provides the Bureau Reclamation with the needed flexibility to expedite water transfers, move non-project water on Federal facilities, and construct temporary structures and wells during times of drought. This Act also authorizes Reclamation to assist in drought contingency planning with all 50 States, tribes, and territories. The Drought Relief Act is by no means a silver bullet to drought. This is the authority Reclamation turns to as a last resort during times of emergency.

At the time the Act was originally authorized in 1992, California was experiencing its sixth consecutive year of drought. Unfortunately, we are facing the same dry conditions as before, except that our droughts are more prolonged and the demands on the resource have only increased. In Oregon, nearly $10 million dollars was used for activities in the Klamath Region in 2010. Predictions for next year's water year in Klamath Basin and across the west are bleak, yet the authorization for this program has already expired. H.R. 3176 simply provides Reclamation with one more tool to help our communities during times of drought.

I come from a region where water issues are complicated and complex. Water can also be expensive. H.R. 3189, legislation introduced by Rep. Tipton, touches at the heart of these issues. Ski Areas are concerned about the Forest Service's Directive to transfer their water rights to the Federal Government. While at the same time, the Forest Service is concerned about their ability to manage the land if the ski resorts were to sell their rights.

A recent court ruling found that the Forest Service did not follow the proper administrative procedures prior to issuing the directive, and threw out the 2012 Directive. The Forest Service is in the process of revising its directives and receiving comments, which prior to the shutdown, would have been released next month. The public would then have 60 days prior to the release to comment on the new directives. This is an issue that seems resolvable without the need for legislation.

Yet the proposed legislative solution goes above and beyond the disagreement between the Forest Service and the Ski Resorts, and overreaches to apply to all actions that require a permit on Federal lands. The consequences of this legislation on grazing practices and oil and gas development are unknown. And due to Congress's own inaction to reopen the Federal Government, the Administration is not here to testify on the impacts of this legislation.

I know there are unanswered questions for both bills, including for the Drought Relief Act. We have requested this information from the Department and were not able to get prior to the shutdown. As a result, we do not have all the information available to properly consider these bills and will be submitting questions for the record.

It is our responsibility to ensure that legislation receives the proper vetting to ensure that they are of the best interest of the public. Part of the process is feedback from our Federal partners. We cannot do this when nearly 60,000 Department of Interior employees remain furloughed because of the shutdown.

We must stop fiddling while Rome burns. The answers we need for this hearing demand that the government be reopened.

Mr. MCCLINTOCK. The Chair is now pleased to recognize Mr. Gosar for 5 minutes.

STATEMENT OF THE HON. PAUL A. GOSAR, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ARIZONA

Dr. GOSAR. Thank you, Chairman McClintock, for holding today's hearing, and to my friend, Congressman Scott Tipton, for introducing this important legislation.

In the West we have a saying: Whiskey is for drinking, water is for fighting over. And nowhere is that more true than the State of Arizona. In Arizona water means life. The majority of my State would be an underpopulated desert without the forward thinking of leaders when it comes to water policy. Those leaders recognize that Arizona faces constraints on its water supply more severe than almost any other State in the Nation and took careful, proactive precautions to protect and manage our water resources.

In fact, before Arizona even became a State, the territorial legislature adopted the 1864 Howell Code that established our prior appropriations doctrine over surface water rights.

The pursuit of water enabled a small State of ranchers, miners, and farmers to take off economically and become the beautiful, diverse place to live in today. And the century-long battles over our natural resources, in particular water rights, had an integral role in formulating our State's political landscape. Today Arizona is a very independent State politically shaped by people of all walks of life who have valued States rights and self-determination. That is why this bill we are considering today is so important.

Arizona has one of the most, if not the most, intricate State water laws in our country. The right to water is a carefully guarded property right held at a higher value than a person's home or material possessions. So the notion that the government can come in and hold permits, leases, and rights of way hostage in efforts to get a private entity to forfeit its private property rights, its water right, is downright offensive, and that is exactly what the United States Forest Service is currently doing.

Under a 2011 directive pertaining to ski area special use permits, the Forest Service is trying to require an applicant for a permit to relinquish privately held water rights to the Federal Government as a permit condition. There is no compensation for this transfer of rights even though our constituents or their descendents have spent major portions of their lives and their money to develop these rights. This is an egregious policy that must be stopped and is a violation of our State sovereignty and individual property rights.

In rural Arizona our economy is heavily reliant on activities on Federal lands, including the northern Arizona ski area, Arizona Snowbowl, our mines, our ranches, and our agricultural production. These industries are the bedrock of Arizona's five C's and our economic viability. And the Forest Service's policies could bring all of these important economic drivers to a halt.

My friend Congressman Tipton's legislation, the Water Rights Protection Act, shields our constituents from this kind of Federal regulatory water grab and upholds our State's sovereignty to protect its water interests. I strongly support these goals. In fact, I see fighting for these goals as my obligation as one of Arizona's rural representatives to the Federal Government.

I look forward to working with some of the experts on the ground in Arizona and with Scott to ensure that no State-recognized water rights go unprotected from the class of actions this bill prohibits. Ultimately I look forward to helping the bill's sponsors quickly advance this bipartisan legislation. Its enactment is critical to reasserting State sovereignty over water rights and the economic viability of our Western communities.

I look forward to hearing from the witnesses, and I yield back the balance of my time. Thank you.

Mr. MCCLINTOCK. Thank you. The Chair is now pleased to recognize the gentleman from California, Mr. Costa, for 5 minutes.

STATEMENT OF THE HON. JIM COSTA, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. COSTA. Thank you very much, Mr. Chairman.

For the purposes of my opening comments I will direct them to the DeFazio bill as it relates to drought relief. And I think it is important that the subcommittee at the time consider the benefits that have accrued over the years when we have had to deal with States, particularly Western States, that have dealt with the challenges of drought conditions that we know are cyclical as we look at over 100 years of recorded weather history.

And the fact is that the drought relief assistance from the Federal level has made a difference. I am looking at a series of printouts that indicate from 2007 to 2012, from Arizona to Utah, to States that have benefited from drought relief assistance by the Federal Government. I think it is important that we continue to provide support. Obviously the States have their own sovereignty as it relates to many of the water issues that are in their jurisdiction.

However, the fact is that we know that where water flows food grows, and it is an absolute essential key resource as it relates to our urban populations as well. So there is a hand-in-glove relationship between our water resources in America, and nowhere is that felt greater than in Western States because of the arid conditions, of course.

The fact is that most of our infrastructure that has been developed for water in the West is aging. It varies in length, but some of it is over 100 years old. If it were not for the development of that water resource when the West was being developed, we would not have the ability to provide the multiple, various economies that exist in our Western States.

I am very worried that we are treating water as we are treating many of the other issues around here; i.e., a political football. We can have differences, but the fact of the matter is we must invest in our water infrastructure. We know that the climate is changing. I don't care whether folks want to just discern that man has a limited role in that, I think that is subject to debate. But the fact is the weather has been changing for millions and millions of years. You just look at the tree ring studies done in the sequoias of the Sierra Nevada Mountains, where over the last thousand years, because these trees are as old as 2,000 years old, and older in some cases, where they can determine cycles that have occurred between the narrowness of the rings of the trees between wet cycles and dry cycles.

So the fact is weather is changing, it will always continue to change. And if in fact the weather patterns continue to change, our water systems may be inadequate to deal with our future needs. They are inadequate to deal with California's current needs. We have a water system that was designed for 20 million people. Today we have 38 million people. By the year 2030 we will have 50 million people. And the fact is we are not making the same kind of commonsense solutions that our parents and our grandparents did generations ago.

So obviously I will be speaking in support when we get to the DeFazio measure on how we can continue to support efforts by States that have benefited from this drought relief assistance, and I look forward to continue working with all of my colleagues—all

of my colleagues—on a bipartisan basis, because that is the only way—only way—we ever get anything done in this place.

Thank you very much, Mr. Chairman.

Mr. MCCLINTOCK. The Chair is pleased to recognize Mr. Amodei for an opening statement.

STATEMENT OF THE HON. MARK E. AMODEI, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEVADA

Mr. AMODEI. Thank you, Mr. Chairman. And I want to thank my colleague from Colorado for introducing this measure.

In the short time that I have been here this has come up several times, and I think it is important to note, as it always is, what the bill actually says. It talks about requiring transfer. Nothing in the legislation says please ignore water issues when you are making permitting decisions. They are legitimate things to be considered as you make any land use permit.

The part that necessitates this bill in my experience is this: On multiple occasions you have had Federal land management officials not consult the State water administrator, State water engineer, whatever they are called in your particular district. They have usurped that authority completely and said, I have groundwater concerns and therefore I am conditioning your permit or I am denying it without ever talking to the individual who under State law has exclusive authority to adjudicate those matters.

That is an important first part because those matters, if you don't like the way they adjudicate them, you have administrative processes, you have judicial processes, you have due process for addressing that. In a Federal permitting context if you usurp that State engineer's authority without ever even really talking to him, then what you have left is almost nothing. And so it is not ignore groundwater issues, it is please go to the person who has jurisdiction.

And then we move to the second part, which the bill does say on multiple occasions we are in violation of the law in my State. And by the way, it is not much different from the Ranking Member, all Western States, it is a large amount of surface area that the Federal Government owns. That is the fact. No sense lamenting it or whatever. We can talk about what to do about that. But the fact is you own a large amount. And really you need to own the water rights, too, to have control over it, when you control the surface area?

So when you tell somebody in the agricultural industry when there is a State law in my State that says you cannot hold stock water groundwater rights unless you own stock, and the Forest Service says we don't own stock but we want to condition a permit on you issuing your stock water permit to the Forest Service, it is a condition for a Federal permit which is in black letter law violation of State law.

And when you say, what are you doing? Well, we kind of think we have authority under NEPA to do that. Could you please point that out? We just think we do for supposition for this connection, for that connection. And the idea is not to bash those folks, but it is to say you really don't have the authority to do that. What an

ultimate act of hypocrisy to condition a Federal permit on violation of a State water law for which you really don't have that.

I want to make two more points, though, because if it is really about the resource, in my State the Federal Government can hold water rights, just comply with State law and you can be issued. So it is not that you can't have them, but this thing where you skip the State engineer and do your own basically no due process process to rule on State water law or you require an absolute violation of State law for a Federal permit is not good business. And I join with my colleagues both from California, that is not good business regardless of what side of the fence you are on.

So I want to give a shout-out to my colleague from Colorado, and the drafting of this is actually very, very elegant in terms of, my god, it is a page long and just says, hey, play by the State rules on water issues. If the BLM or the Forest Service have a concern about groundwater then go talk to the State engineer and whatever he or she says is what everybody lives with. But do not ignore the State engineer and bring those duties onto yourself.

So with that, Mr. Chairman, I appreciate the opportunity to participate today and the courtesies the subcommittee has extended me, and I yield my remaining time to my colleague from Utah.

STATEMENT OF THE HON. ROB BISHOP, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF UTAH

Mr. BISHOP. Thank you, Mr. Amodei. I appreciate that.

I want to say two things very quickly. Number one is, I appreciate the committee holding a hearing on these bills, very good bills, and I am cosponsor of one of them, and I appreciate the leadership of that.

Number two, I want to specifically recognize and welcome Randy Parker from the State of Utah, Utah Farm Bureau Association, here as one of the witnesses. He understands the significance of water as it relates to agriculture and ranching in our areas and how important it is. Obviously it cannot be done without water rights.

I mean, there is a cliche we have in Utah that it would be far better to be head of the ditch than it would be head of the church. That is one the issues that we have at hand here. And I appreciate his comments on this. He will explain why it is so significant to maintain water rights that have traditionally been there as these people have entered into these operations and guarantee that they are maintained.

And so I appreciate his willingness to be here. I appreciate your willingness to indulge me as part of this committee. I came in late, so I will make up for that by leaving early because I have another committee right now. And this does not give Mr. Costa and others, and Mrs. Napolitano, a chance to abuse me if I leave. So I think that is probably the best thing I could possibly do. But I do want to thank you for inviting Mr. Parker and inviting me to be part of this committee.

Mr. MCCLINTOCK. Well, here is your hat, what is your hurry? Mr. Bishop actually is entitled to another 4½ minutes on his own.

Mr. BISHOP. To which I will yield back for everything else.

Mr. MCCLINTOCK. Well, the committee always appreciates a dramatic exit.

Just for the record, the Chair wants to allay the concerns that were expressed earlier regarding the shutdown and the absence of the U.S. Forest Service. The U.S. Forest Service actually informed the subcommittee before the shutdown that they could not appear on the Tipton bill, would not discuss it. Their new directive is being reviewed by the OMB and they said they can't talk about it until the review is done and the directive is out for public comment. And so the shutdown does not affect the Forest Service's willingness to be here today. They were not willing to be here anyway.

With that, and if there are no other opening statements by committee members, the Chair is pleased to welcome our panel of witnesses and once again to thank them for their patience and indulgence. Each witness' written testimony will appear in the full hearing record, so I would ask that you keep your comments down to 5 minutes. The timing lights are pretty simple, green you have all the time in the world, yellow is 1 minute, red means that you are out of time and out of attention of the membership. I think there was a study done some time ago that indicates that 5 minutes is about the maximum attention span of a Member of Congress, so keep that in mind when that red light goes off.

And with that, the Chair is pleased to welcome our first witness today, Mr. David Corbin, Vice President for Planning and Development at Aspen Skiing Company from Aspen, Colorado, to testify.

STATEMENT OF DAVID CORBIN (H.R. 3189), VICE PRESIDENT, ASPEN SKIING COMPANY, ASPEN, COLORADO

Mr. CORBIN. Thank you, Mr. Chairman. I understand the limitation on time and will try to briefly summarize the comments.

My name is David Corbin. I am Vice President of Planning and Development for Aspen Skiing Company. We are a ski area operator and hospitality company located in Aspen, Colorado. Personally, I have 25 years experience in the ski industry, working first with Vail Resorts, and for the past 8 years I have been with Aspen Skiing Company. I had the privilege of working in the industry from Lake Tahoe, to the Central Rockies, to the White Mountains of New Hampshire, and worked on Federal lands in all of those locations at some point or another.

Aspen Skiing Company owns four ski areas. We have four special use permits. We employ about 3,400 people locally in peak season and we host 1.4 million skier visits in Aspen, again on public lands. We are members of Colorado Ski Country, and we are likewise members of the National Ski Areas Association. The National Ski Areas Association is essentially our national body that represents our interests as an industry before Congress and other public agencies and performs a variety of activities on our behalf, but represents 121 different ski areas across the country who operate on the public lands.

We very much support—and by we, I mean Aspen Skiing Company, Colorado Ski Country, and NSAA—very much support this bill and thank Congressmen Tipton and Polis in particular as Colorado Representatives and sponsors, as well as the other sponsors. We believe the Water Rights Protection Act is very much essential

to our business and protects our business interests in ways that we appreciate a great deal.

We value and respect our partnership with the U.S. Forest Service. We indeed work quite closely with them. I regard my White River forest supervisor as a very close colleague personally and professionally. We likewise believe we are very capable and intelligent stewards of the land and work quite carefully to protect the environmental standards that this country aspires to.

In the course of that, we likewise think that water is absolutely an essential element to our business. And in response to one of the comments I heard before, we do not get any water with our special use permits. When a special use permit comes to us, the Federal Government hasn't given us additional water in the course of issuing that permit. We go out and acquire it, we buy it, we procure it, we go ahead and buy it from other providers as well.

We look to Congress to provide some assistance. Indeed the agency is in the process of promulgating rules and has proposed rules before. We believe this bill is very helpful in guiding or steering the agency toward what we believe would be more prudent rules and regs. We very much like the bill in the sense that it does not require us to transfer those separate water rights that we have purchased and developed and built infrastructure for on our own. We like the fact that there would be a prohibition against such a compulsory transfer, which we very much think is a taking. And we would hope Congress would likewise see it that way and help and support us in that regard.

Ourselves, we use a fair amount of water, 200 to 250 million gallons a year in snowmaking. That is essential to us. Snowmaking essentially provides the base for us to begin and completes our season. And for our purposes we cannot see those rights evaporate or be lost as it would severely jeopardize our ability to operate, and it would likewise financially subject us to very difficult circumstances because we need both Christmas season and end of season to essentially make our economics work. So to lose snowmaking and to lose the water associated with it would very much jeopardize our operations and our continued financial viability.

We hope that you would take our testimony, written as it is, before you into account, and I very much appreciate the opportunity to speak to you today.

Mr. MCCLINTOCK. Thank you very much for your testimony.

[The prepared statement of Mr. Corbin follows:]

PREPARED STATEMENT OF DAVID CORBIN, VICE PRESIDENT OF PLANNING & DEVELOPMENT, ASPEN SKIING CO., ASPEN, COLORADO

Thank you for the opportunity to testify today on behalf of Aspen Skiing Co. Aspen Skiing Co. owns and operates four resorts in Colorado, Aspen Mountain, Aspen Highlands, Snowmass and Buttermilk. During its winter peak, ASC employs approximately 3,400 people in Pitkin County, Colorado, hosts nearly 1.4 Million skier visits annually, and pursuant to four Special Use Permits issued by the United States Forest Service, operates on National Forest System land, as do 120 other ski areas nationally. Collectively, these 121 public land resorts accommodate the majority of skier visits in the U.S. and are located in the states of Arizona, California, Colorado, Idaho, Montana, Nevada, New Hampshire, New Mexico, Oregon, Utah, Vermont, Washington and Wyoming. The ski industry generates $12.2 Billion in economic activity annually.

At the outset, I would like to emphasize that Aspen Skiing Co., our state association Colorado Ski Country USA, and the national association, NSAA, are united in our support of H.R. 3189, the Water Rights Protection Act. We would like to thank the sponsors of this legislation, and I would like to especially thank Colorado Congressmen Tipton and Polis, for working together to protect the rights of ski areas.

Aspen Skiing Co. greatly values and respects our partnership with the U.S. Forest Service. We likewise take seriously our responsibilities with respect to stewardship of the land and water resources arising from it. At the same time, we view protection of ski area water rights, typically privately acquired, developed and applied and unrelated to the original issuance of our Special Use Permits, as essential to our business sustainability and as a top priority for the ski industry as a whole.

The ski industry is united in looking to Congress to take action to protect water rights and to protect the state laws that govern water rights allocation, administration and adjudication. We collectively believe that protecting water rights from encroachment by the Federal Government will help ensure the future success of ski areas on public land and the mountain communities that depend on them.

The proposed Water Rights Protection Act would prohibit the Forest Service from requiring that ski areas apply for water rights in name of the U.S. or transfer water rights to the U.S. as a condition of our special use permit. As such, the Act would prohibit the Forest Service from issuing the very ski area water clause that it issued in 2012, that was the subject of a legal challenge and lawsuit brought by the National Ski Areas Association last year. The proposed law would protect ski area water rights and provide certainty to ski areas and other water rights holders that the Federal Government is not going to seize these valuable property rights without compensation. This will benefit ski areas and the rural economies dependent on them. Finally, it upholds state water law. For all of these reasons, the ski industry wholeheartedly supports H.R. 3189.

By way of background, water is an essential element of our business and snowmaking insures that we are able to operate and offer winter recreation in any given year, even in years of low snowfall. Although Aspen Skiing Company's domestic use per year is comparatively modest, less than 3 million gallons a year, we use on average from 200 to 250 million gallons a year to make snow, which returns to the watershed in the form of ground water and surface runoff each spring. Our cost in water, labor and energy to make and distribute this snow is roughly $2 M to $2.5 M per year. Our sources of supply include rivers and streams, wells and springs, and municipal providers. We have acquired and hold a wide array of rights and interests in water, some of which include conventional stream and ditch appropriations dating back to 1882. Others include a recent $3 MM investment in a storage reservoir fed by a stream from which we've historically drawn, which essentially enabled us to open Snowmass ski area last year despite a very dry fall and early winter.

The magnitude of our operational costs, acquisition and investment in water rights and infrastructure is not unusual. Collectively, ski areas invest hundreds of millions of dollars on water rights to support and enhance their operations and water rights are considered highly valuable assets to ski area owners. These water rights have been and are presently obtained by ski areas under long standing State law.

Water is crucial not just to our current operations, but to our very sustainability and on-going vitality as recreational businesses, particularly in an era of drought and warming temperatures. For reasons both altruistic and commercial it is in our own interests to protect, conserve and optimize the sensible use and application of our water resources.

Beyond our own viability and commercial health, ski areas are major employers in rural economies helping maintain employment and driving job creation in rural and mountain economies. The physical and economic sustainability of ski areas directly impacts the future health, maturation and growth of rural economies associated with ski areas.

USFS water clauses that demand transfer of ownership of ski area water rights to the United States substantially impair the value of these ski area assets. The taking of these assets by the government hinders a ski area's access to capital, creates uncertainty with respect to a resort's ability to make adequate snow and operate successfully in the future, and most importantly, provides a huge disincentive for ski areas to invest in water rights and infrastructure in the future. Ask yourself this question: why would a ski area invest in water rights and infrastructure if they are simply going to be taken by the government? It is obviously not sound business practice to acquire and improve assets that are going to be taken from you. Unfortunately, the impact of such a punitive disincentive does not stop with the ski area.

In so far as it adversely affects our business sustainability over time, it inevitably ripples through our companion rural economies.

The Forest Service is now in the process of developing a new ski area water clause. It is our hope that this proposed legislation will positively shape the forthcoming policy. Like the proponents of this bill, the ski industry will not accept a Forest Service water policy that takes private water rights from ski areas. As an alternative, the ski industry offered a new approach to a ski area water clause in conjunction with the Forest Service's ongoing public process on water policy. This new approach would address the Forest Service's concerns about having sufficient water for future ski area operations, but does not involve government seizure of assets.

Briefly, we offered a two part framework:

1. For future projects which require water for implementation, ski areas will demonstrate that sufficient water is available to support those projects. This would be a part of the review and approval process going forward for proposals that include on mountain facilities or snowmaking;
2. Upon sale of a ski area, resorts will provide an option to purchase at fair market value sufficient water to reasonably run the ski area to a successor ski area owner. If the successor ski area declines to exercise such option, the ski area would offer it to the local government; if the local government declined to exercise the option, the Forest Service would have the option to buy the water.

As an express condition of supporting this approach, water clauses previously imposed upon ski area permittees by the agency must be declared unenforceable, superseded, and null and void, and would be removed from every ski area permit.

We offered this compromise to demonstrate our willingness to work constructively toward resolution of this issue, and to demonstrate that the Federal Government need not take and own these private water rights to accomplish its objectives of ensuring ski area operational sustainability and local economic health, which we share. The bill under consideration today and the ski area's alternative approach to water policy are complimentary. We urge passage of this bill as soon as possible to send a clear message to the Forest Service to shape its policy and write its rules and regulations in a manner that respects water rights and state water law.

Thank you for the opportunity to address this committee. I would be happy to answer or respond to any questions you may have.

Mr. MCCLINTOCK. The Chair is now pleased to recognize Mr. Randy Parker, the CEO of the Utah Farm Bureau Federation, from Sandy, Utah, to testify.

STATEMENT OF RANDY PARKER (H.R. 3189), CEO, UTAH FARM BUREAU FEDERATION, SANDY, UTAH

Mr. PARKER. Thank you, Mr. Chairman, Ranking Member, and committee members. Thank you for the opportunity to be here.

My name is Randy Parker. I am CEO of the Utah Farm Bureau Federation. I am here today representing more than 28,000 member families in Utah and more than 6 million families who are members of the American Farm Bureau. Through our grassroots process, Farm Bureau provides policymakers with recommendations on water in Utah and in the Western public land States.

Farm Bureau is concerned with the Federal Government expanding its reach and control over Utah and its natural resources. Utah farmers and ranchers want Federal agencies to honor State water law and to not claim ownership of water developed on public lands. Utah Farm Bureau supports H.R. 3189 because it recognizes the State sovereign water rights and protects livestock water rights from illegal Federal claims and takings.

The American Farm Bureau policy calls on Congress to dispel uncertainty. The Intermountain Region of the U.S. Forest Service

has filed more than 16,000 diligence claims on Forest System lands in Utah challenging ownership and increasing uncertainty. The agency says its claims are based on Federal ownership of the land and water the ranchers used prior to Congress granting Utah statehood. Couldn't that be argued to be the same in every State in the Union?

American Farm Bureau opposes any preemption of State law, pointing out water rights as property rights cannot be taken without just compensation and due process of law. Farm Bureau supports H.R. 3189, the Water Rights Protection Act, because it is designed to dispel uncertainty and recognizes State sovereignty and historic water law. In addition, it underscores the constitutional protections of just compensation and due process of law.

To illustrate the need to protect livestock water rights, the experience of a Tooele County, Utah, grazing association is instructive. In the spring of 2012 ranchers were presented with a packet from the Forest Service that requested that they sign a change of use application. Change applications allow the Forest Service to change use of the water from livestock to other uses as determined by the agency. The ranchers were told if they did not comply it could adversely affect their turnout onto their forest grazing allotment. The ranchers were not only concerned how the action impacted their water rights, but how it would impact cattle grazing on those allotments into the future.

The Forest Service protested, suggesting the request was in error and that they were only asking ranchers to sign a joint ownership agreement. In either case, signing a change of use application or agreeing to a certificate of joint ownership, the Federal agency is seeking a relinquishment either in whole or in part as a condition of access to the grazing allotment.

In Tooele County, Utah, or anywhere across the Utah landscape where livestock graze on the public lands and use the State's water, it is the economic driver for our rural communities. Livestock production is the economic engine of Utah's rural cities and towns. Passage of H.R. 3189 will build rural communities by providing certainty, not by seizing assets through relinquishment or diminishment of livestock water rights.

Livestock water is available in stock water troughs, in guzzlers, in seeps, and in small streams scattered across Utah's back country. It benefits not only sheep and cattle, but wildlife, like sage grass, deer and elk, and even threatened and endangered species like the Utah prairie dog.

Utah has joined other Western States, like Idaho and Nevada, in protecting historic livestock water rights and limiting Federal ownership. Utah's Livestock Water Rights Act defined the beneficial user as the owner of the grazing permit. The Forest Service seized on that opportunity, filing on livestock water rights on every active allotment in Utah, claiming they are the owner of the grazing permit.

In closing, it is important to note that the Utah Livestock Water Rights Act makes livestock water rights pertinent to the grazing allotment on which the livestock is watered. It provides certainty to ranchers and underscores our commitment to rural Utah that grazing will continue on the public lands. This commitment in

H.R. 3189 provides greater certainty to ranchers and the future of public land grazing than the assurances of Federal bureaucrats and being at the whims of our fickle legal system.

Thank you, Mr. Chairman. I look forward to questions.

Mr. MCCLINTOCK. Thank you, Mr. Parker.

[The prepared statement of Mr. Parker follows:]

PREPARED STATEMENT OF RANDY N. PARKER, CHIEF EXECUTIVE OFFICER, UTAH FARM BUREAU FEDERATION, SANDY, UTAH

The Utah Farm Bureau Federation, Utah's largest farm and ranch organization, supports passage of H.R. 3189, the Water Rights Protection, an Act prohibiting Federal agencies from conditioning ongoing use of grazing permits or other use agreements based on the transfer, relinquishment or impairment of water rights sovereign to the States.

The Utah Farm Bureau represents more than 28,000 member families including a significant number of livestock producers who use the Federal lands for sheep and cattle grazing. Livestock ranching is an important part of the history, culture and economic fabric of Utah and is a major contributor to the State's economy.

Utah food and agriculture contributes to the State's economic health and provides jobs to thousands of our citizens. Utah farm gate sales in 2012 exceeded $1.6 billion. Utah State University analyzed the forward and backward linkages to industries like transportation, processing, packaging and determined food and agriculture are the catalyst for $17.5 billion in economic activity, or about 14 percent of the State GDP, and provides employment for nearly 80,000 Utahns with a payroll of more than $2.7 billion.

FARM BUREAU POLICY

Delegates to the November 2012 annual convention of Utah Farm Bureau Federation adopted policy calling on the Federal Government to "not claim ownership of water developed on Federal land." In addition, Utah Farm Bureau policy calls for State control of water rights and for livestock water rights to be held by the ranchers holding grazing rights as a protection against Federal encroachment on sovereign State waters.

American Farm Bureau Federation representing more than 6 million members from across our Nation adopted policy at the January 2013 annual convention calling on Congress to "dispel uncertainty" and provide that the "water flowing from the reserved lands and other Federal lands shall be subject to State authority." American Farm Bureau opposes reserved water rights on Federal lands except through filing with the State for rights in accordance with State law.

American Farm Bureau policy continues expressing opposition to "any Federal domination or pre-emption of State water law" and that "water rights as property rights cannot be taken without compensation and due process of law."

HISTORY

Scarcity of water in the Western United States led to the development of a system of water allocation that is very different from how water is allocated in regions graced with abundant moisture. Rights to water are based on actual use of the water and continued use for beneficial purposes as determined by State laws. Water rights across the west are treated similar to property rights, even though the water is the property of the citizens of the States. Water rights can be and often are used as collateral on mortgages as well as improvements to land and infrastructure.

The arid west was transformed by our pioneer forefathers through the judicious use of the precious water resources. Utah is the Nation's second most arid State, second only to Nevada. For our predecessors, protecting and maximizing the use of the water resources was not only important, it was a matter of life and death.

Land ownership patterns and where precipitation, rain and snow, accumulates in the Intermountain Region of the U.S. Forest Service especially in Utah has been a long running cause for debate and conflict. The U.S. Forest Service reports that the Forest System Lands are the single largest source of water in the continental United States providing more than 14 percent of the available supply. (Attachment A)

A review of the Forest Service maps would suggest a large portion of agency's captured water takes place in the western public States within the Snake and Colorado River Basins and in the mountains of the Sierra-Nevadas, the Cascades and the Rocky Mountains. These lands in the Intermountain Region are the source of a

large portion of the States surface water and underground recharge. (Attachment B)

CONGRESSIONAL ACTIONS

The settlers in the arid west developed their own customs, laws and judicial determinations to deal with mining, agriculture, domestic and other competing uses recognizing first in time, first in right. Out of these grew a fairly uniform body of laws and rights across the western States. The Federal Government as original sovereign and owner of the land and water prior to Congress granting statehood ultimately chose to acquiesce to the territories and later the States on control, management and allocation of water.

Act of July 26, 1866

The U.S. Congress passed the Act of July 26, 1866 [subsequently the Ditch Act of 1866] that became the foundation for what today is referred to "Western Water Law." The Act recognized the common-law practices that were already in place as settlers made their way to the western territories including Utah. Congress declared:

> *Whenever, by priority of possession, rights to the use of water for mining, agriculture, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws and decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed; but whenever any person, in the construction of any ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage. (43 U.S.C. Section 661)*

This Act of Congress obligated the Federal Government to recognize the rights of the individual possessors of water, but as important, recognized "local customs, laws and decisions of State courts."

Western water law or the "doctrine of prior appropriation" governs the use of water in many of the States in the west. The fundamental principle embodied in the doctrine of prior appropriation is that while no one may own the publicly owned resource, persons, corporations or municipalities have the right to put the water to beneficial use any defined by State law. For purposes of beneficial use, the allocation of right rests in the principle of "first in time, first in right." The first person to use the water is the senior appropriator and later users are junior appropriators. In Utah, and across the west, this principle protects the senior water right priority for this scarce and valuable resource.

Beneficial uses are determined by State legislatures generally including livestock watering, irrigation for crops, domestic and municipal use, mining and industrial uses.

The Desert Land Act of 1877

> *"All surplus water over and above such actual appropriation and use . . . shall remain and be held free for appropriation and use of the public for irrigation, mining and manufacturing . . ."*

The Taylor Grazing Act of 1934

> *"nothing in this Act shall be construed or administered in a way to diminish or impair any right to the possession and use of water for mining, agriculture, manufacturing and other purposes . . ."*

The McCarran Amendment of 1952

Congress established a unified method to allocate the use of water between Federal and non-Federal users in the McCarran Amendment. (43 U.S.C. Section 666) The McCarran Amendment waives the sovereign immunity of the United States for adjudications for all rights to use water.

> "waives the sovereign immunity of the United States for adjudications for all rights to use water."

The 1976 Federal Land Policy Management Act

> "All actions by the Secretary concerned under this act shall be subject to *valid existing rights*."

The rights of the States to govern water has been recognized by generations of Federal land management agencies as directed by the U.S. Congress.

Gifford Pinchot

In 1907, Gifford Pinchot, "father" of the United States Forest Service (USFS) and the First Chief Forester explicitly reassured western interests in the agency's "use book" noting that water is the sovereign right of the State. Pinchot declared:

"The creation of the National Forest has no effect whatever on the laws which govern the appropriation of water. This is a matter governed entirely by State and Territorial law."

COURT ACTIONS

Joyce Livestock vs. United States
Idaho Supreme Court 2007—Opinion No. 23
"Beneficial Use Standard Defined"

In the Joyce Livestock Company vs. United States, the Owyhee County based cattle operation had ownership dating back to 1898 including in-stream stock water rights. The United States over-filed on the Joyce water rights based on a priority date of June 24, 1934—the date of passage of the Taylor Grazing Act. A special master recommended the water right claimed by the United States be granted. District Court said the special master erred and that the agency lacked the necessary intent. District Court determined that Joyce needed to show evidence that they believed they had acquired such water rights in their grazing permit applications. The United States could not show that Joyce or any of its predecessors were acting as it agents when they acquired or claimed to have acquired the water rights. As had been required, Joyce made application for grazing rights under the Taylor Grazing Act on April 26, 1935. The District Court awarded Joyce water rights with a priority date of April 26, 1935.

The United States appealed the District Court ruling to the Idaho Supreme Court regarding the in-stream water rights for stock watering claimed by the United States based on ownership and control of the Federal land under its management obligation in the Taylor Grazing Act. The Idaho Supreme Court denied the United States claim and defined the standard of beneficial use under the constitutional method. The Idaho Supreme Court said:

> *"The District Court held that such conduct did not constitute application of the water to beneficial use under the constitutional method of appropriation, and denied the claimed rights. The Idaho Supreme Court concurred holding that* ***because the United States did not actually apply the water to a beneficial use*** *the District Court did not err in denying its claimed water rights."*

H.R. 3189 supports this important legal finding: *Ownership or control of the land does not meet the constitutional method of putting the water to beneficial use, generally defined in State law as non-wasteful use of water such as agriculture, municipal, industrial, mining, and so forth for establishing ownership and control.*

United States vs. Wayne Hage
Nevada Federal District Court (2013)
"Trespass and Access Rights Defined"

The U.S. Forest Service and BLM in 2007 filed suit in Nevada Federal District Court against the estate of Wayne Hage alleging trespass on Federal lands arising from a long-standing conflict. Nevada District Court Chief Judge Robert C. Jones presided.

At issue were water rights established by the Hage family in 1865 based on beneficial use recognized long before Nevada was a State or the Forest Service was an agency of the Federal Government. Following the enactment of FLPMA, a pattern of harassment ensued by the Federal Government challenging cattle grazing rights, over-filing on livestock water rights and frustrating the rights of the ranchers to maintain 28 miles of ditches across the Nevada desert to deliver long held water rights to pastures and livestock. The Congressional Act of July 1866 (The Ditch Act) clearly protected the rancher's right to move water across the Federal lands. The Federal agency agreed, but held the maintenance to an impossible pick and shovel standard. The ongoing ditch dispute and the impoundment and sale by the U.S. Forest Service of $39,000 worth of cattle in 1991 moved the conflict into a series of lawsuits on takings and trespass.

The U.S. Forest Service filed suit against the Hage Estate (Wayne died in 2006) for trespass related to cattle grazing and use of livestock water rights on the Federal grazing allotments. During questioning in a Reno courtroom on witness credibility Intermountain Regional Forester Harv Forsgren was found to be lying to the court. In a statement, Judge Jones stated: "The most pervasive testimony of any-

body was Mr. Forsgren. I asked him, has there been a decline in the region or district in AUMs (permitted animal unit months grazing). He said he didn't know. He was prevaricating. His answer speaks volumes about his intent and his directives to Mr. (Steve) Williams." Anybody of school age or older knows "the history of the Forest Service in seeking reductions in AUMs and even the elimination of cattle grazing . . ."

The agency's arrogance and view of the sovereign water rights of the State was highlighted when Steve Williams, Humbolt-Toiabe Forest Ranger, testified in a court deposition:

"despite the right (of the Hages) to use the water, there was no right to access it, so someone with water rights but no permit from the U.S. Forest Service would have to lower a cow out of the air to use the water, for example, if there were no (agency granted) ***permit to access it."***

Judge Jones found:

- Congress prescribed grazing rights on Federal lands were to be granted based on a rancher's ownership of water rights established under local law and custom.
- Hage has a right of access to put his livestock water rights to beneficial use, therefore the livestock could not be found in trespass.
- USFS employee Steve Williams was found in contempt of court and guilty of witness intimidation.
- Tonopah BLM manager Tom Seley as found in contempt of court and guilty of witness intimidation.
- Williams and Seley were held personally liable for damages with fines exceeding $33,000.
- The Hage's were found guilty of only two minor trespass violations and were fined $165.88
- Regional Forester Harv Forsgren was excluded from testifying at trial during witness credibility hearing for lying to the Court.

Chief Judge Robert C. Jones stated at the conclusion of the case:

> ***"I find specifically that beginning in the late '70s and '80s, first, the Forest Service entered into a conspiracy to intentionally deprive the defendants here of their grazing rights, permit rights, preference rights."***

In the related "Constitutional Takings" case, Wayne Hage in 1991 sued the U.S. Forest Service in the U.S. Court of Federal Claims. The case went to trial in 1998 to determine property interests. In 2004, a second trial was commenced to determine which property had been taken and its value. In 2008, Chief Judge Loren E. Smith ultimately awarded a $4.4 million plus interest judgment against the Federal Government.

As expected the United States appealed in the Federal Circuit Court of Appeals in Washington DC. The Appeals Court, a three judge panel in 2012, overturned portions of the Smith decision including the financial judgment citing the claims were not ripe. But the Appeals Court expressly did agree that the Hage's have "***an access right***" to their waters on the Federal lands.

H.R. 3189 supports historic ownership of livestock water rights and access: *The bill recognizes water rights are the sovereign rights of the States and provides that livestock water rights established through the beneficial use method shall not be surrendered as a condition of use or access to livestock grazing rights on Federal allotments.*

Solid Waste Agency of Northern Cook County (SWANCC) vs. U.S. Army Corps of Engineers
United States Supreme Court 159, 172–173 (2001)
"Defining Federal Agency's Administrative Authority"

Without clear Congressional authorization, Federal agencies may not use their administrative authority to "alter the Federal-State framework by permitting Federal encroachment upon traditional State power."

In SWANCC vs. U.S. Army Corps of Engineers the U.S. Supreme Court held that the Corps' use of the long controversial "migratory bird rule" adopted by the Corps and the U.S. Environmental Protection Agency to expand regulatory authority over isolated wetlands exceeded the authority granted by Congress.

The Court chided the agency for over-reaching in its regulatory obligations and authority:

> "Where an administrative interpretation of a statute invokes the outer limits of Congress's power, we expect a clear indication that Congress intended that

result. This requirement stems from our prudential desire not to needlessly reach constitutional issues and our assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority. ***This concern is heightened where the administrative interpretation alters the Federal-State framework by permitting Federal encroachment upon traditional State power. Unless Congress conveys its purpose clearly, it is not deemed to have significantly changed the Federal-State balance.***

H.R. 3189 supports limiting Federal agency interpretation of Congressional action: *The bill clearly establishes Congressional intent supporting the historic Federal-State relationship and rights under western water law. Congress, beginning with the "Ditch Act" and more recently the McCarran Amendment and FLPMA, established a Federal-State framework for water "waiving the sovereign immunity of the United States" in water adjudications. H.R. 3189 backs this historic Federal-State relationship. It precludes the Forest Service and BLM from acquiring livestock water rights as a condition of the rancher's use of the grazing allotment and protects the holder of the livestock water right—a taking under the Constitution.*

UTAH CONFLICT

Water conflicts between Federal land management agencies and Utah have challenged sovereignty, ownership and access. The conflict seems to be about exercising Federal control, even over the State's water. Increased demands, growth and higher value of water has complicated the relationship leading to increasing conflict between Federal agents and Utah's livestock ranchers. This conflict is easily detailed in the Intermountain Region's filing claims on all livestock water associated with Utah's Forest grazing allotments to its demands of individual ranchers to relinquish their water rights or agreeing to "joint ownership" with the Forest Service. The demands for Utah water by the United States Forest Service control are unrelenting.

Via FLPMA Congress declared that the United States would retain remaining public domain lands unless disposal of a parcel served the national interest. This Federal action changed resource management authority and undid land grant laws that had been in place for more than a century. The 1960 Multiple Use—Sustained Yield Act granted rights, privileges, use and occupancy with a legal status and nonrevocable easement. FLPMA transitioned to greater use of "permits" and special use authorization. "Permit holders" now were required to conduct activities based on conditions specified by the granting Federal agency. The reasonableness of the regulations and conditions of use are constantly in question. Whether its regulations issued by headquarters or the local determination, "reasonable" has become a contentious concept.

The current test for reasonable regulations does not address the constitutional takings implications specifically as relates to livestock water rights on Federal lands.

The issue of "right" vs "permit" has been hotly debated for generations among ranchers, rancher advocates and the Federal agencies since FLPMA altered the relationship.

The Taylor Grazing Act of 1934 granted a "grazing right" that was tied to a Federal grazing allotment. The courts have held that the rights granted by Congress to harvest forage on Federal grazing allotment are "Chiefly valuable for livestock grazing." This legally recognized right in turn provided a level of assurance for ranchers to use their livestock water rights and ultimately to put them to beneficial use as required by Utah law.

When conflicts arose, the courts generally upheld the United States right to control and regulate often adversely impacting access to Federal grazing allotments and use which were often adverse to grazing rights and use of livestock water rights.

Confrontation between Federal land managers and livestock grazing interests became a part of doing business. Mostly, those with sheep and cattle grazing permits capitulated to the force of the Federal agents and the courts. Cuts in grazing permits and the Federal agencies accumulating suspended use grazing permits became common place in Utah and across the west. Reducing livestock numbers or limiting access to grazing allotments, can provide a defacto water right to the Federal agency based on the rancher's inability to use their livestock water rights.

Under Utah law if water is not put to beneficial use for a prescribed period of 7 years, the water right is forfeited. Forest Service agents have the ability to control allotment access, determine use at the location of the livestock water right, set the numbers of sheep and cattle on the allotment using the water and ultimately the Federal Government determines the ability of the rancher to put his livestock water right to beneficial use.

Challenging Federal authority has been almost futile. Few have the financial resources to engage in what the Federal agencies assured livestock ranchers would be costly and protracted litigation. The ranchers were and continue to be at a decided disadvantage to the tax-payer funded deep Federal pockets and army of agency lawyers they would meet at trial.

Diligence Claims

The aggressive posture of the Forest Service in collecting western water rights shows that the Intermountain Region (Utah, Nevada, Idaho and Colorado) has filed on or holds in "excess of 38,000 stock water rights." These claims has been ongoing in Utah for generations. To date, these demands exceed 16,000 diligence claims made on livestock water rights scattered across Utah's forest allotments. Regional Forester Harv Forsgren argued these diligence claims are made on behalf of the United States, which was the owner of the land where livestock grazed prior to statehood and livestock watering took place which action established the Federal Government's claim to water rights.

A "Diligence Right" or "Diligence Claim" under Utah law is a claim to use the surface water where the use was initiated prior to 1903. In 1903, statutory administrative procedures were first enacted in Utah to appropriate water. Prior to 1903, the method for obtaining the right to use water was simply to put the water to beneficial use. To memorialize a diligence claim, the claimant has the burden of proof of the validity of beneficial use prior to 1903. Interestingly, the Intermountain Region's diligence claims pre-date the 1905 establishment of the Forest Service. These claims will ultimately be determined by the State Engineer under the guidance of the Utah Legislature.

Intermountain Region Policy

In a letter dated June 29, 1984, Robert H. Tracy, Director of Watershed and Air Management for the U.S. Forest Service stated nine reasons why his agency needed to control the water and why livestock water rights should remain on the land rather than with the ranchers holding the grazing permits. This action identifies the transition point of the U.S. Forest Service to a more aggressive Federal agency in dealing with water issues in the western public lands States.

The Intermountain Region has made and continues to make the argument that it is important for the Federal Government to hold the water rights to assure continued livestock grazing on public lands. In an August 15, 2008 Intermountain Region Briefing Paper addressing the 2003 Nevada law that precludes the Nevada State Engineer from approving any new applications, permits or certificates filed by the United States for stock water the Regional Forester said: "It is the policy of the Intermountain Region that livestock water rights used on national forest grazing allotments should be held in the name of the United States to provide continued support for public land livestock grazing programs."

The decision by Nevada to preclude the Forest Service from ownership of water rights led to stonewalling and ultimately little or no water development or investment (both agency and private) in livestock water rights.

An Intermountain Region guidance document dated August 29, 2008 provides important insights into the agency's legal strategy on Forest Service water claims: "The United States may claim water rights for livestock use based on historic use of the water. Until a court issues a decree accepting these claims, it is not known whether or not these claims will be recognized as water rights."

This aggressive policy continues as Mr. Forsgren presented in testimony before the House Subcommittee on National Parks, Forests and Public Lands on March 12, 2012. He noted the Nevada legislation that precludes the United States from holding livestock water rights telling the Subcommittee: "The Forest Service believes water sources used to water permitted livestock on Federal land are integral to the land where the livestock grazing occurs; therefore the United States should hold the water rights for current and future grazing."

The U.S. Forest Service manual currently under consideration for reauthorization defines a possessory claim to water rights in the name of the United States and directs personnel to:

> "Claim water rights for water used by permittees, contractors and other authorized users of the National Forest System, to carry out activities related to multiple use objectives. Make these claims if both water use and water development are on the National Forest System . . ."

The United States Constitution and Utah Constitution protect private property from being taken by government without just compensation. The Utah Constitution further protects private property from taking or damage without just compensation.

Claiming historic water rights without just compensation and due process violates Constitutional protections.

Utah Livestock Water Rights Act

Recognizing rancher frustrations with protecting livestock water rights and armed with the Idaho Supreme Court Joyce Livestock decision, in early 2008 Utah Representative Mike Noel introduced legislation to define and protect the rights of ranchers holding State livestock water rights on Federal grazing allotments.

As relates to H.R. 3189, The Utah Livestock Water Rights Act (Utah Code Title 73 Chapter 3 Section 31) provided two important and fundamental principles:

1. *"the beneficial user of a livestock watering right is defined as the grazing permit holder for the allotment to which the livestock watering right is appurtenant."*

This is important because it identified livestock using the water as a beneficial user and associated it with the allotment managed by the Federal Government agencies. The Utah State Engineer was directed to issue a "Livestock Water Right" Certificate. The State Engineer noted for the record, the Certificate does not quantify or establish an adjudicated Utah water right.

The Act however defined the "beneficial user" as the "person who owns the grazing permit." The Regional Forester immediately argued the United States is the owner and filed for the livestock water rights on every active livestock grazing allotment in Utah. Recognizing the Nevada conundrum and faced with the claim by the Regional Forester to water ownership on every grazing allotment, the Utah Legislature amended the Utah Livestock Water Rights Act providing "joint ownership"—the rancher and the Federal agency. Forest employees immediately and actively encouraged ranchers to sign the joint ownership agreement.

In addition, Utah's Livestock Water Right Statute also provides that the livestock water right is tied to the grazing right and appurtenant to the Federal grazing allotment. It reads:

2. *"A livestock water right is appurtenant to the allotment on which the livestock is watered."*

This is an important provision in Utah law that addresses the Federal agency's argument they need to hold the water right to assure the multiple use and grazing mandate. Utah provides a greater level of assurance to this end than the Federal agency's assurances and the whims of the legal system.

Utah joining Idaho and Nevada in precluding the Forest Service from holding or acquiring livestock water rights increased the pressure from the agency. The Journal of Land, Resources and Environmental Law in 2009 noted the 2008 Utah Livestock Water Rights Act impacted Federal agencies and that dispute could affect their relationship with livestock producers "who depend on cooperation for management of these grazing allotments on Federal land."

Before the 2009 Utah Legislature, the Regional Forester pointed out the Nevada conundrum to policymakers. With no interest in the water for the United States on Federal land in Nevada, the approvals for maintenance and development of water came to a standstill. This very real threat by the Federal Government was the catalyst for amending the Utah Act to provide for a certificate of "joint ownership" in livestock water.

H.R. 3189
THE WATER RIGHTS PROTECTION ACT

Tooele County Grazing Association

H.R. 3189 specifically addresses conflicts and potential misunderstanding between agencies and ranchers as happened in Tooele County Utah.

Ranchers with livestock grazing rights on Forest Service administered lands in Utah's Tooele County west of Salt Lake City in the spring of 2012 were confronted with a packet from the local Forest agents seeking a "sub-basin claim" from the Utah Division of Water Rights. The packet specifically called for the ranchers to sign a "change of use" application allowing the Forest Service to then determine what and where the use of the livestock water would be. In effect, the request would allow the Federal agents to then determine use, including changing it from livestock to wildlife, recreation or elsewhere.

The ranchers objected to the Forest service request. The request then became a demand and the ranchers were told that not complying could adversely affect their "turn-out" or the release of their sheep or cattle onto their Forest grazing allotments.

The ranchers were concerned that the actions of the Federal agents compromised their livestock water rights and ultimately take from them not only the value of their water rights, but could take the value of the livestock feed associated with the grazing allotment.

The ranchers brought Utah Farm Bureau into discussions with the Forest personnel, Utah water rights authorities, State and local officials and Farm Bureau leaders. It should be noted the Forest personnel objected to the acquisition of strong arming to get the "change" documents signed. The ranchers stood their ground pointing out they were in fact told not complying could hurt access onto their grazing allotment. This Forest Service action called for the relinquishment of the water right in exchange for approving the conditional use of the grazing allotment.

In a follow up meeting with ranchers and Farm Bureau, local Forest employees were now accompanied by the Regional Forester. Mr. Forsgren told the group there must have been a misunderstanding. The local Forest agents in asking for the "change" application should have been asking for a joint ownership certificate. He further stated, any inference that not complying with the request would adversely impact access to the grazing allotment was a misunderstanding as well.

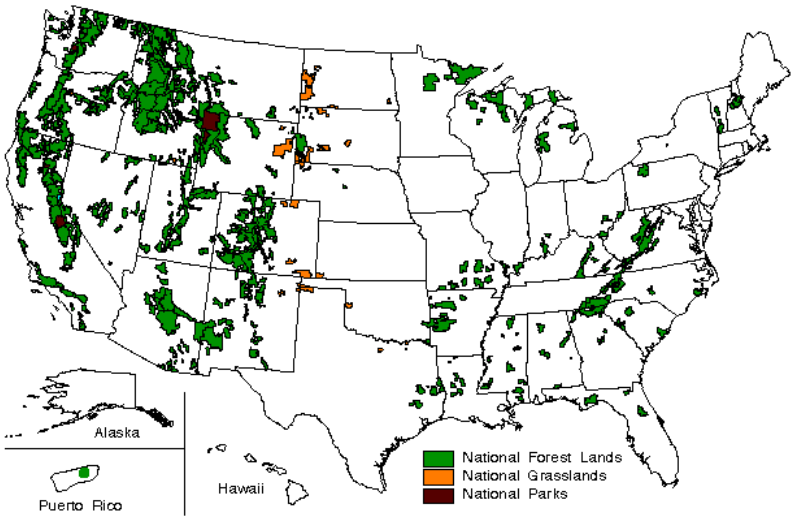
H.R. 3189 will assure that these "misunderstandings" and Federal agents seeking ownership of livestock water rights as a condition of access to the Federal grazing allotment does not happen in the future. Congress provided for grazing on Federal lands to harvest renewable forage to invest in the rural economy and provide meat protein to all Americans. As Federal agencies manage under multiple use principles, the State of Utah has provided assurances that livestock water will remain on the land with the grazing allotment.

This concludes my prepared testimony.

ATTACHMENT A

U.S. Forest Service

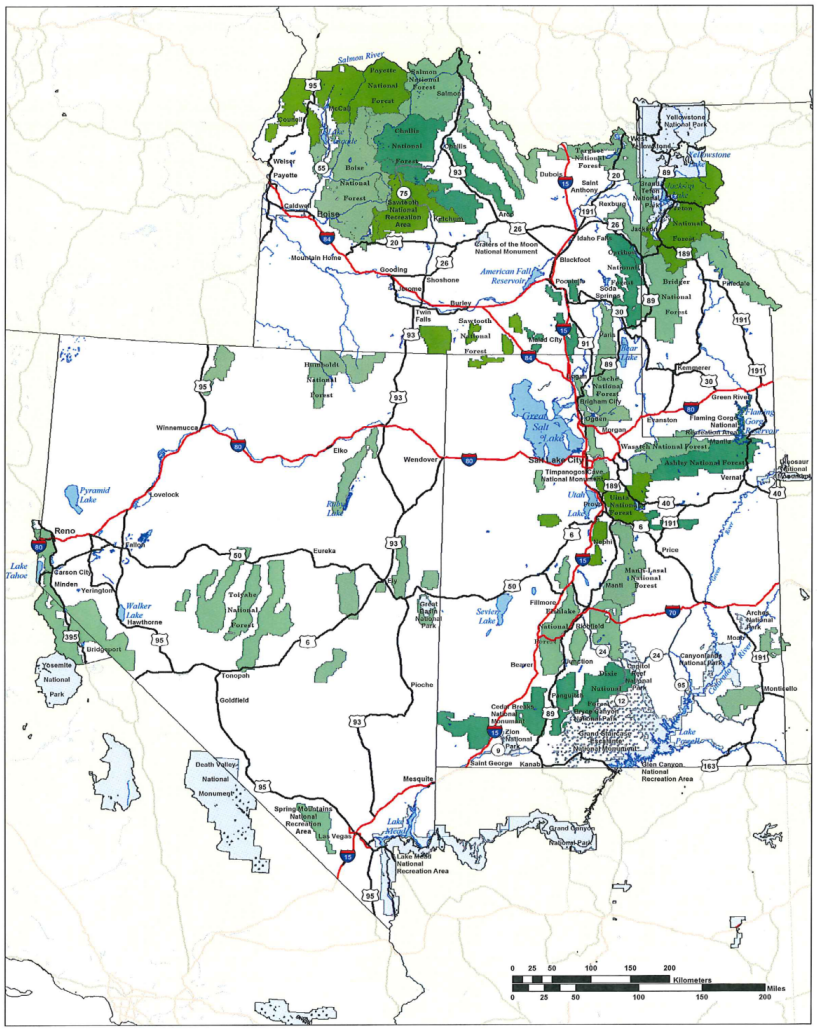
Importance of National Forest System Lands in the U.S. Continental Water Supply



• National Forest System Lands are the largest single source of water in the continental United States, over 14 percent of available supply.

ATTACHMENT B

United States Forest Service
Intermountain Region



Mr. MCCLINTOCK. The Chair is now pleased to recognize Mr. Glenn Porzak, attorney for the National Ski Area Association, from Boulder, Colorado to testify. Welcome.

STATEMENT OF GLENN PORZAK (H.R. 3189), ATTORNEY, NATIONAL SKI AREAS ASSOCIATION, BOULDER, COLORADO

Mr. PORZAK. Thank you very much. I appreciate the opportunity to testify today in support of H.R. 3189. I am here principally on

behalf of the National Ski Areas Association, but also here on behalf of the Eagle River Water and Sanitation District and the Upper Eagle Regional Water Authority. With regard to the National Ski Areas Association, as has been mentioned, it has 121 members that operate under Forest Service lands, and that constitutes the majority of the ski area visits in the United States, and they are located in 13 separate States. Those ski areas generate over $12.2 billion in annual revenue.

With regard to the Eagle River Water and Sanitation District and the Upper Eagle Regional Water Authority, they serve the over 60,000 people from the areas of Vail to Wolcott. That spans the congressional districts of both Congressman Tipton and Congressman Polis. And they are the second-largest municipal water supplier on the Western slope of Colorado.

The ski industry, as has been mentioned, literally spends collectively hundreds of millions of dollars on the water rights that they use for their various operations. They are valuable assets to the ski area owners, and that water is absolutely crucial to their operations and their future growth.

In turn, those operations and that future growth directly impacts the rural and mountain economies in which those ski resorts operate. They employ over 160,000 people in those rural and mountain environments, and their economies as well depend on that investment in the water. If there is not enough water for the snowmaking, for the domestic uses, then you are going to see a major impact to the resort communities that are in the vicinity of those ski areas.

One of the important points that I want to make is that we talk in terms of the fact that this is a ski area issue. It is far more than a ski area issue. In the course of the original litigation over the first water right directive that was issued, it was discovered that not only is there a directive issued specifically at the ski areas, but there are other directives that are issued at municipal water providers, the grazing industry, and others. And indeed the legislation proposed would prevent the taking of water rights, not just of the ski areas, but also the municipalities and the grazers and other resort communities. And that is an important thing to keep in mind, that there is a systemwide impact, if you will, that we believe violates not only the Fifth Amendment of the U.S. Constitution, but also the congressional authorization that the Forest Service has.

The next point that I want to make is that Congress has not delegated the authority to the Forest Service to use its Federal land use power to seize water rights owned by non-Federal entities. Whether you look to the Federal Land Policy Management Act, to the National Forest Management Act, or any other of the organic Acts, they defer to State law and make it clear that the Forest Service does not have the authority to take water rights under their land use authorities.

And the last point is that this is not a new issue. Over 20 years ago this effort was attempted by the Forest Service, and as a result of that Congress formed the Federal Water Rights Task Force, and it issued a report in August of 1997, and I will just quote from that. “Congress has not delegated to the Forest Service the authority necessary to allow it to require that water users relinquish a

part of their existing water supply or transfer their water rights to the United States as a condition of the grant or renewal of the Federal permits."

Thank you very much. I look forward to answering any questions you may have.

Mr. MCCLINTOCK. Thank you, Mr. Porzak.

[The prepared statement of Mr. Porzak follows:]

PREPARED STATEMENT OF GLENN PORZAK, ATTORNEY, NATIONAL SKI AREAS ASSOCIATION, BOULDER, COLORADO

Thank you for the opportunity to testify today in support of H.R. 3189 on behalf of the National Ski Areas Association (NSAA), the Eagle River Water and Sanitation District (District) and the Upper Eagle Regional Water Authority (Authority). The NSAA has 121 member ski areas that operate on National Forest System lands under a special use permit from the U.S. Forest Service. These public land resorts accommodate the majority of skier visits in the U.S. and are located in 13 States. The ski industry generates $12.2 billion in economic activity annually. The District and Authority collectively provide municipal water service to over 60,000 people from Vail to Wolcott. This area spans the districts of Congressmen Polis and Tipton in Colorado. The District and Authority are the second largest municipal water provider on Colorado's western slope.

Collectively, ski areas have invested hundreds of millions of dollars on water rights to support and enhance their operations. Water is crucial to ski area operations and ski area water rights are considered valuable assets to ski area owners. Water is crucial to future growth of ski areas, and that future growth directly impacts the rural economies associated with ski areas. Ski areas are major employers in rural economies, employing 160,000 people, and help drive job creation in rural and mountain economies. The same is true for municipal water providers; in particular, those that provide water service to the resort communities. They have invested hundreds of millions of dollars on their water rights, and those water rights are essential to meeting their water service obligations to many thousands of people.

This bill responds to recent Forest Service attempts to implement permit conditions that require the transfer of privately and publically held water rights on National Forest system lands to the Federal Government as a permit condition. There is no compensation for these mandated water right transfers despite the fact that the ski areas and municipal providers have invested millions of dollars in developing these water rights. The Forest Service has issued directives to this effect that apply to not only the ski industry, but all other special use permit holders on Forest System lands, including municipal water providers, recreation residences, resorts, marinas and other users. By issuing these directives, the Forest Service has not only violated the Fifth Amendment to the U.S. Constitution by taking property without paying compensation, it has attempted to use its permitting authority to circumvent long established Federal and State water laws. The Water Rights Protection Act protects these privately and publically held water rights, prohibits Federal takings, and upholds State water law by:

—Prohibiting agencies from implementing a permit condition that requires the transfer of water rights to the Federal Government in order to receive or renew a permit for the use of land;
—Prohibiting the secretary of the Interior and the Secretary of Agriculture from requiring water users to acquire water rights for the United States, rather than for the water user themselves;
—Upholding longstanding Federal deference to State water law.

This bill does not create new law as Congress has not delegated authority to the Forest Service to use its Federal land use power to seize water rights owned by non-Federal entities. Specifically, none of the governing Federal statutes delegate such authority to the Forest Service, including the Organic Administration Act of 1897 (16 U.S.C. § 475, 481, & 526), § 505 of the Federal Land Policy and Management Act of 1976 ("FLPMA") (43 U.S.C. § 1765), NFMA (16 U.S.C. § 1604(i)), or the Ski Area Permit Act of 1986 (16 U.S.C. § 497b). In fact, FLPMA and NFMA provide for the protection of valid existing rights and FLPMA requires that water is to be allocated in accordance with water rights established under State law. *See* § 701(g) and (h) of FLPMA (43 U.S.C. § 1701, note re: Savings Provisions, Pub. L. 94–579); § 505 of FLPMA (43 U.S.C. § 1765); and NFMA, 16 U.S.C. § 1604(i).

In 1996, Congress created a Federal Water Rights Task Force, P.L. 104–127 § 389(d)(3), in response to a controversy in Colorado over the attempt by the Forest Service to require permit holders to relinquish part of their water supply for secondary National Forest purposes as a permit condition. In its August 25, 1997 Report, the Federal Water Rights Task Force concluded that "Congress has not delegated to the Forest Service the authority necessary to allow it to require that water users relinquish a part of their existing water supply or transfer their water rights to the United States as a condition of the grant or renewal of Federal permits. . . ." The Task Force further concluded that "[u]nless Congress explicitly granted to the Forest Service the authority to use permitting authority to require bypass flows or the transfer of title to the United States, the Forest Service must respect and protect non-Federal water rights in its planning and decisions, and it must attain National Forest purposes through the acquisition and exercise of Federal water rights in priority." (Part VI, Paragraph 1).

The Task Force also stated that the Forest Service must recognize that:

> water rights established under State law are property rights for purposes of the Fifth Amendment to the United States Constitution [and that] because Congress severed water from the public lands and allowed third parties to obtain vested rights in and to the continued use of water derived from public lands absent an explicit grant of authority by Congress, the authority of the Forest Service derived from the Property Clause of the United States Constitution and land management statutes does not include the ability to use land management authority to reallocate or otherwise obtain for Federal use, without the payment of just compensation, water that has been appropriated by or on behalf of non-Federal parties. (Part VII B, Paragraph 2).

For the same reasons detailed by the Task Force Report, the Forest Service's efforts to gain control over water rights are invalid because they exceed the Forest Service's legal authority and the implementation would result in an unlawful taking of property without just compensation in violation of the Fifth Amendment of the U.S. Constitution. Thus, H.R. 3189 complies with and is supported by both Federal constitutional and statutory law.

Mr. MCCLINTOCK. The Chair is now pleased to recognize Mr. Tony Willardson of the Western States Water Council, based in Murray, Utah, to testify.

STATEMENT OF TONY WILLARDSON (H.R. 3176), EXECUTIVE DIRECTOR, WESTERN STATES WATER COUNCIL, MURRAY, UTAH

Mr. WILLARDSON. Thank you, Mr. Chairman and Representative Napolitano and the other members of the subcommittee. The Council is an advisory body to the Western Governors and our members are appointed by the Governors and represent senior water managers and administrators. It is actually a little ironic that I am here after being snowed-in in South Dakota for 3 days, that I am here to talk about drought. And I spent 3 days in a hotel with a good friend of Mr. Amodei's, Mr. Roland Westergard, who is a member of the Council.

My testimony is based on a position, which is included for your review. And as part of that I would also like to recognize that part of this Act authorizes the Secretary to work with other Federal and State agencies in providing hydrologic data collection and water supplier forecasting. And before you, I believe you have a brochure which talks about another program that we support, the National Integrated Drought Information System, which includes the support of the Department of the Interior.

Drought has been and continues to be serious in the West. This is an October 1 diagram of the extent of the drought. While there

has been some alleviation, there is still most of the West that is afflicted by moderate to extreme drought, with a few exceptions, and with a few areas where there is still exceptional drought.

NOAA has determined that three of the five most costly weather-related disasters, including Katrina and Superstorm Sandy, the other three are drought. We are still calculating the cost of the drought last year. Actually, it was record-breaking and compares only to the drought of 1934 in terms of its persistence and magnitude. It is also unusual in its quick onset and has become known as a flash drought. And it will be some time before we can fully calculate all of the costs. But that highlights the need to focus resources on planning for and mitigating drought impacts.

These antecedent conditions we anticipate will mean the drought will be with us for some time, with continuing impacts on the economy, the environment, and other interests. As was mentioned by Representative Napolitano, it is estimated that drought costs $6 to $8 billion a year in the United States. To the ski industry last year, it is estimated that skier visits were down nearly 12 percent in 2012 compared to 2011. Seventy percent of the Nation's crop and livestock production was affected last year. There was over a billion dollars in damages due to wildfire. And the Colorado River experienced its worse or its driest year since records began in 1985, with only 44 percent of the average annual runoff.

But notwithstanding the severity, in the past we have taken a reactive approach to responding to drought on an ad hoc basis, and we need to be much more proactive. In 1996 the Western Governors set a goal, an aggressive goal, changing the way we deal with drought and responding to drought and being more prepared. And we have worked with a number of Federal agencies, including the Bureau of Reclamation, to improve our management. One out of every five farmers in the West is served by the Bureau of Reclamation, along with 31 million people. And they have a very important role to continue to play in water supply management and reliability in the West.

I mentioned, too, that with respect to the assistance that they provide under the Act, the authorities that are unique, they have the ability to participate in drought banks, as well as to acquire water from willing buyers and facilitate trades between buyers and sellers, to provide water under temporary contracts, and also make reclamation facilities available for the storage and conveyance of both project and nonproject water, as well as to acquire water for fish and wildlife.

With respect to planning, Benjamin Franklin said, "By failing to plan, you are preparing to fail." And the planning aspects of this bill are also important. States have primary authority over the allocation of use of water, and I want to emphasize that. But we have long supported integrated water resources management and planning and the need for comprehensive respond to drought.

And I just conclude by saying that if the exceptional drought conditions that we have, and absent reauthorization of this bill, it will be even more difficult to address many of the challenges that we face and there will be serious consequences for small communities, for tribes, and others who do not have the resources that are avail-

able to them and assistance through this Act. Thank you very much, Mr. Chairman.

Mr. MCCLINTOCK. Great. Thank for your testimony.

[The prepared statement of Mr. Willardson follows:]

PREPARED STATEMENT OF ANTHONY WILLARDSON, EXECUTIVE DIRECTOR, WESTERN STATES WATER COUNCIL, MURRAY, UTAH

H.R. 3176—to reauthorize the Reclamation States Emergency Drought Relief Act of 1991

I. INTRODUCTION

Chairman McClintock, Ranking Member Napolitano and Members of the Subcommittee, the Western States Water Council (WSWC) is a non-partisan policy advisory body closely affiliated with of the Western Governors' Association (WGA). The WSWC represents 18 western States and WSWC's members are appointed by their respective Governors to represent their States. Our membership includes senior state water managers and administrators. Moreover, 12 Federal agencies, including the U.S. Bureau of Reclamation, have appointed representatives that comprise a Western Federal Agency Support Team (WestFAST) working with western Governors to address pressing western water issues, including drought.

Our testimony is primarily based on WSWC Position #347, which strongly supports legislation to reauthorize the Reclamation States Emergency Drought Relief Act (43 U.S.C. 40), providing the Bureau of Reclamation with much-needed tools to respond to record-breaking drought. Of note, "The Secretary is authorized to work with other Federal and State agencies to improve hydrologic data collection systems and water supply forecasting techniques to provide more accurate and timely warning of potential drought conditions and drought levels that would trigger the implementation of contingency plans."

The WSWC strongly supports such authorized activities and similarly reauthorization of the National Integrated Drought Information System (NIDIS).

II. DROUGHT IN THE WEST

Drought has been, is, and will be an ongoing fact of life in the arid West. While conditions in many areas have improved recently, much of the West and Midwest continue to be affected by moderate to extreme drought, with a few areas of exceptional drought, as illustrated by the U.S. Drought Monitor of October 1, 2013. In the Summer of 2012, some two-thirds of the country was experiencing some level of drought, and this past spring nearly half the Nation was affected by moderate to exceptional drought conditions.[1]

Unfortunately, the most up-to-date information is unavailable due to the shutdown of National Oceanic and Atmospheric Administration's (NOAA) Web site, www.drought.gov.

Of note, NOAA estimates that three of the five most costly U.S. weather related disasters were droughts—with Hurricane Katrina ranked #1, and Super Storm Sandy #4. The cost of the Drought of 2012 has yet to be fully calculated. Still, the figures available underscore the economic, environmental and social costs related to drought, and the need to focus more resources on planning for and mitigating drought impacts, as well as facilitating a prompt response during drought emergencies.

Although recent precipitation has somewhat improved drought conditions, particularly in the Midwest,[2] the U.S. Seasonal Drought Outlook suggests drought will likely persist in much of the West for some time.

Dry conditions this past summer follow the record breaking drought of 2012, which was unique in terms of its sudden onset, persistence, and magnitude—both in terms of extremes and the large geographic area affected.[3] For example, over 60 percent of the contiguous U.S. experienced moderate to extreme and exceptional drought during 2012, with only 1934 comparable in duration and geographic ex-

---

[1] Kelly Helm Smith, *Drought Shifts West on April 23 U.S. Drought Monitor as Heavy Rains Drench the Midwest*, Nat'l Drought Mitigation Ctr. News (Apr. 18, 2013), http://drought.unl.edu/NewsOutreach/NDMCNews.aspx?id=90.

[2] *Id.*

[3] *Hearing on Drought, Fire and Freeze: The Economics of Disasters for America's Agricultural Producers before the U.S. Senate Committee on Agriculture, Nutrition, and Forestry*, 113th Cong. 1, 3 (Feb. 14, 2013) (statement of Roger Pulwarty, Director, National Integrated Drought Information System).

tent.[4] Last year, was also the warmest year on record for the contiguous U.S. dating back to 1895.[5]

Not surprising, these antecedent conditions coupled with the ongoing drought have adversely impacted a broad spectrum of economic, environmental, and other interests across the West and the Nation as a whole, the effects of which will reverberate for years to come. Examples include:

- According to some estimates, drought costs the U.S. economy between $6 billion to $8 billion per year,[6] with the cost of the 2012 drought possibly exceeding $35 billion.[7]
- Agriculture accounted for much of the economic costs of the 2012 drought,[8] due in part to moderate or exceptional drought conditions affecting around 70 percent of the Nation's crop and livestock production at certain times during the year.[9]
- For only the third time in over 40 years, wildfires across the country burned more than 9 million acres in 2012, causing over $1 billion in damage.[10] The most damaging fires occurred in the West, including the Whitewater-Baldy Fire which burned 297,845 acres in New Mexico's Gila National Forest.[11]
- The Colorado River Basin experienced one of its driest years in the 1895–2012 period of record, with only 44 percent of its annual average runoff.[12]
- Skier visits to the 21 resorts that comprise Colorado Ski Country USA were down 11.5 percent in 2012, compared to 2011.[13]

Notwithstanding the severity of these impacts and the relative frequency of drought in many parts of the West and the Nation, in general, we have to often taken a reactive approach to drought, responding on an ad hoc basis to each drought crisis as it develops. However, over the years, many western States and Federal agencies have undertaken more proactive approaches to coordinated planning and preparedness intended to avoid or mitigate adverse impacts before they happen.

Of note, in the 1996 Drought Response Action Plan, the WGA set an aggressive goal of changing the way our Nation prepares for and responds to drought, with subsequent efforts by the WGA and the WSWC designed to promote a comprehensive, coordinated, and integrated response to drought at all levels of government. We have worked with Federal agencies, including the Bureau of Reclamation, to promote, proactive, cooperative drought contingency planning and response.

III. THE RECLAMATION STATES EMERGENCY DROUGHT RELIEF ACT

The Bureau of Reclamation is the Nation's largest wholesale water supplier, providing water to over 31 million people and supplying irrigation water to one out of five western farmers.[14] Notwithstanding Reclamation's vital role as a water supplier in the West, the Act constitutes the whole of its specific drought response and planning authority. Consequently, failure to reauthorize the Act will limit Reclamation's ability to deliver assistance in response to present drought impacts and also limit its ability to help States, tribes, and other stakeholders plan for mitigating and minimizing future drought impacts.

A. Title I—Assistance During Drought

Title I of the Act authorizes Reclamation to undertake construction, management, and conservation measures during drought to minimize or mitigate damage or loss, including authority to act as a "last resort" to aid smaller towns, counties, and

---

[4] *Id*.

[5] Nat'l Climatic Data Center, Wildfires—Annual 2012 (Jan. 7, 2013), http://www.ncdc.noaa.gov/sotc/fire/2012/13.

[6] W. Governors Ass'n, Creating a Drought Early Warning System for the 21st Century, preface (2006), http://westgov.org/reports/doc_download/394-creating-a-drought-early-warning-system-for-the-21st-century-nidis.

[7] Pulwarty, *supra* note 3 at 2 (citing Aon Benfield Reinsurance Group's Annual Global Climate and Catastrophe Report).

[8] *Id*.

[9] U.S. Dep't of Ag., Economic Research Service, U.S. Drought 2012: Farm and Food Impacts, http://www.ers.usda.gov/topics/in-the-news/us-drought-2012-farm-and-food-impacts.aspx#.UXhHzbU4udh.

[10] Pulwarty, *supra* note 2 at 1; Nat'l Climatic Data Center, Wildfires—Annual 2012 (Jan. 7, 2013), http://www.ncdc.noaa.gov/sotc/fire/2012/13.

[11] U.S. Forest Serv., Whitewater-Baldy Complex Final Community Update (June 28, 2012), http://www.fs.usda.gov/detail/gila/news-events/?cid=STELPRDB5377297.

[12] Pulwarty, *supra* note 3 at 1.

[13] *Id*.

[14] U.S. Bureau of Reclamation, Bureau of Reclamation: Facts and Information, (Jan. 4, 2013), http://www.usbr.gov/main/about/fact.html.

tribes that lack the financial capacity to address drought impacts on their own. It also authorizes Reclamation to acquire water to meet diverse requirements under the Endangered Species Act, while at the same time benefiting water users and water delivery contractors at a time when they often face significant financial challenges. Other beneficial drought response actions that Reclamation can undertake under Title I include:

- Participation in water banks established under Federal law;
- Facilitation of water acquisitions between willing buyers and willing sellers;
- Acquisition of conserved water for use under temporary contracts;
- Making Reclamation facilities available for storage and conveyance of project and non-project water;
- Making project and non-project water available for non-project uses; and
- Acquisition of water for fish and wildlife purposes.

B. Title II—Drought Contingency Planning

Title II of the Act responds to Benjamin Franklin's oft-quoted adage: "By failing to plan, you are preparing to fail." Specifically, it authorizes Reclamation to assist and participate in the preparation of drought contingency plans in all 50 States and U.S. territories to help prevent or mitigate future drought-related losses. Title II also authorizes Reclamation to conduct studies to identify opportunities to conserve, augment, and make more efficient use of water supplies that are available to Federal Reclamation projects and Indian water resource developments to better prepare for and respond to drought conditions.

States have primary authority over the allocation and protection of water resources within their borders. However, the WSWC has long supported integrated water resource management and encourages the development of comprehensive water plans with State leadership and Federal assistance. This includes a comprehensive and integrated response to drought in which States work with Federal agencies, local communities, and other stakeholders to develop proactive drought preparedness and contingency plans.

Title II authorizes Reclamation to engage in exactly this type of planning, which is critical to the social, environmental, and economic well-being of the West. Reauthorization of the Act is needed to maintain Reclamation's ability to carry out this important work. Otherwise, States, tribes, and local communities will likely be deprived of much needed technical assistance and expertise at a time when some projections indicate that large portions of the West, particularly the Southwest, will become hotter and drier in coming years. Many of these areas are also experiencing increasing demands on already scarce water supplies due to rapidly growing populations, environmental requirements, energy resource development and other factors. As a result, the need for effective drought preparedness and contingency plans has never been greater. Of note, many of the enumerated elements of such plans, including water banks and water rights transfers (both temporary and permanent), may require State authorization.

IV. CONCLUSION

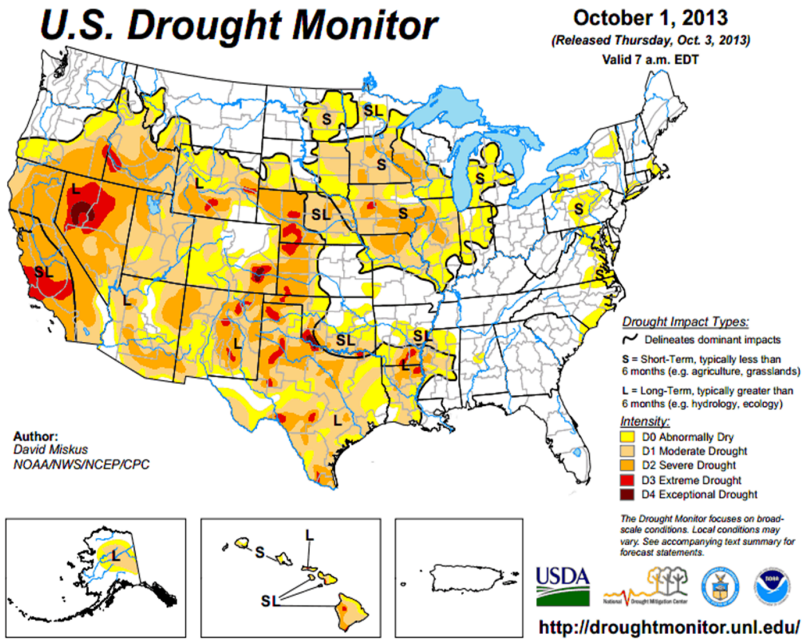
The exceptional drought conditions of 2012 and the ongoing drought that covers much of the West underscores the need to reauthorize the Act. Reauthorization will provide Reclamation with clearer direction and greater flexibility to continue delivering water and much needed financial and technical assistance to States, tribes and local communities suffering from record-breaking drought impacts. Reauthorization will also facilitate more effective State-based and other grassroots drought preparedness and mitigation efforts. Absent reauthorization, Reclamation will lack critical authority to provide emergency assistance.

Moreover, given our member States' experience with implementation of the Act, it may be well to further evaluate the current needs of the States, tribes and local communities and Reclamation's existing authorities and capability to assist in meeting those needs as appropriate. With minor exceptions, such as the drilling of wells, the Act authorizes only temporary, non-structural actions. To maximize the effectiveness and efficiency of such actions, they should be considered and undertaken within the context of both State emergency drought response plans, but broader State water planning activities.

Notably, the Act provides that the programs and authorities become operative "only after the Governor or Governors of the affected State or States . . . has made a request for temporary drought assistance. . . ." Further, the Act states, "All actions taken pursuant to this chapter pertaining to the diversion, storage, use, or transfer of water shall be in conformity with applicable State and applicable Federal law." Last, "Nothing in this chapter shall be construed as expanding or diminishing

State, Federal, or tribal jurisdiction or authority over water resources development, control, or water rights."

The WSWC appreciates the opportunity to submit this testimony and urges the Committee to favorably report H.R. 3176 to reauthorize the Act.



Mr. MCCLINTOCK. And the Chair is now pleased to recognize Mr. Wayne Crews, Vice President for Policy and Director of Technology Studies for the Competitive Enterprise Institute based in Washington, DC, to testify. Welcome to the committee.

STATEMENT OF WAYNE CREWS (H.R. 3176), VICE PRESIDENT, COMPETITIVE ENTERPRISE INSTITUTE, WASHINGTON, DC

Mr. CREWS. I am Wayne Crews, Vice President for Policy at CEI, and I thank the committee for the invitation to address Federal drought relief funding and planning. I come at this issue from the perspective of one who spends most of my time on tech and frontier policy issues, industry policy issues, including compiling an annual Federal regulation report called "Ten Thousand Commandments."

Given environmental barriers to urgently needed water in the West, I completely understand the desire for the funding in H.R. 3176, and granted the dollars sought are trivial in context of the current budget battles, but I caution against any fostering of any further declaration of dependence on Federal dollars in any sector.

The regulatory reforms and infrastructure liberalization actually needed for plentiful, adaptable, environmentally conscious Western water should dominate our attention. The good news is water is not

getting more scarce overall, it is an earthly constant. The bad news is we artificially interrupt access to water, so management and allocation of that constant supply does matter.

The Western and California natural environment is a world wonder, but so, too, is the remarkable manmade infrastructure. Western environments are some of the most altered on Earth, and yet environmental protection is not alien to providing plentiful water, the opposite is true. Restraints like waste stream recapture, conservation and stewardship, property rights regimes, liability and insurance all must evolve alongside infrastructure. Governments often magnify environmental damage and risks. Water resources and environmental amenities should be better integrated into the property rights wealth-creating sector, an evolution long since derailed not just here but elsewhere, like in electromagnetic spectrum, electricity and transportation grids.

Instead of the Drought Reclamation Act, I advocate increasing separation of water and State. We should lessen having government steer while the market merely rows.

Federal policies can be contradictory, too. We hear a lot about a Federal infrastructure bank and we are endlessly regaled about the urgency of bolstering critical infrastructure, but these sentiments are certainly undercut by onerous permitting and environmental regulations that aggravate drought out West.

The fact is, as a free society becomes wealthier, cross-industry creation of infrastructure like water should become easier, not harder. The vastly poorer America of 100 years ago built overlapping, redundant infrastructure. So if we can't do it today, it is largely because of manmade policies, not genuine drought.

Infrastructure can take many forms, but all around better reservoir storage, pipelines and canals, trucking and transport, and crude oil carriers can aid supply and lessen artificial drought and lessen impetus for Federal funding. So, too, can improved trade between cities, farmers, and private conservation campaigns. Improving water infrastructure can also reduce the waste that now depletes some 17 percent of annual supply, as noted in a Competitive Enterprise Institute by Bonner Cohen last year.

All this can supplement direct sourcing alternatives, including drilling, gray and wastewater treatment and reclamation, storm water harvesting and surface storage, and, OK, even desalination where it is economically rational. When linking investment to human needs, private investors can test low-probability projects, counting on rare successes to offset the failures. Markets need to be good at killing bad projects. As CEI's founder Fred Smith puts it, instead of trying to improve speeds by picking particular horses to run on the economic racetrack, we must improve the track itself so all the horses can go faster, and letting jockeys keep more of their earnings means more jobs in these suffering areas, too. Thus we also need sweeping regulatory liberalization. In my written testimony I cover reform options to enable a private sector flush with research and development cash and investment cash to dwarf H.R. 3176.

Finally, this is the Water and Power Subcommittee, and I think it is vital to step back and explore dismantling these regulatory silos that artificially separate our great network industries like

water, electricity, transportation, telecommunications. Leaving antique 19th and 20th century infrastructure regulation intact hampers 21st century investment.

[3:25 p.m.]

Mr. CREWS. Our primary challenge is to integrate modern water resources further into the market process and the sophisticated property rights and capital market systems of the modern world. Despite everything, gallons cost less than a penny and, yes, even fill swimming pools and quench lawns in deserts.

The last time I spoke in the subcommittee I was asked if I thought access to water was a right. Now committee members who believe it is must consider the full implications of that question. What makes abundant water the most critical of critical infrastructures possible? Thank you.

[The prepared statement of Mr. Crews follows:]

PREPARED STATEMENT OF CLYDE WAYNE CREWS JR., VICE PRESIDENT, COMPETITIVE ENTERPRISE INSTITUTE, WASHINGTON, DC

For every action, there is an equal and opposite government program.

—unknown

The Competitive Enterprise Institute (CEI) is a non-profit public policy research organization dedicated to advancing individual liberty and free enterprise with an emphasis on regulatory policy. We appreciate the opportunity to discuss issues surrounding H.R. 3176, a bill reauthorizing parts of the Reclamation States Emergency Drought Relief Act, which "authorizes emergency response and planning assistance that would minimize and mitigate losses and damages resulting from drought conditions." [1]

We see issues surrounding water access and supply in the West and notably Central Valley California as elements of broader infrastructure, property rights and economic growth policy.

Competitive and localized rather than Federal approaches to expanding infrastructure industries and the technologies and innovations underlying them, along with broader Federal regulatory liberalization more generally, will be more effective than Federal funding of particular projects at boosting innovation and resource wealth, enhancing consumer well-being, facilitating commerce and trade and advancing national prosperity.

Water, like other "public goods" resources largely non-privatized prior to the Progressive era, largely has never been brought into the competitive realm since the progressive era interruption of extensions of private property rights, which has had long-term consequences.[2] Like spectrum, airsheds and environmental amenities generally, water is one of the fundamental resources that never fully entered the wealth creating sector.

A MANMADE WESTERN WATERSCAPE NEEDS LESS WASHINGTON

California is a beautiful fraud; a magnificent put-on, an exquisitely lush illusion. From the farmlands of the Central Valley to the swimming pools, green lawns and flowering landscapes of Southern California, it is all a brilliantly engineered masterpiece, an extensive rearrangement of the existing natural order, created by the ingenuity and will of man, and costing billions of taxpayer dollars in the process.

—Aquafornia [3]

The Reclamation States Emergency Drought Relief Act, H.R. 3176, covers 17 western states (and Hawaii), and all 50 with respect to planning.

---

[1] U.S. Department of the Interior, Bureau of Reclamation Web site: http://www.usbr.gov/drought/.

[2] See Fred L. Smith Jr., *Eco-Socialism: Threat to Liberty Around the World*, paper presented at the Mont Pelerin Society Regional Meeting, Chattanooga, Tennessee, September 20, 2003. http://cei.org/pdf/3818.pdf.

[3] http://www.aquafornia.com/index.php/where-does-southern-californias-water-come-from/.

My summary with regard to H.R. 3176, the reauthorization of the Reclamation States Emergency Drought Relief Act, is that one needn't give the world's 8th largest economy $15 million from Federal taxes for relief actions and planning. California is not the only recipient of course, but the bill is counterproductive with respect to water access goals. If that money is allocated, there's no reason it should not be paid back. Meanwhile, regulatory liberalization is a better option for strengthening this vital industry.

California is the land of milk and honey but also the realm of hundreds of dams, canals, aqueducts and reservoirs. Granola and hippie legacy notwithstanding, California's is perhaps the most manipulated environment on the planet, but the nature lovers seem happy remaining there marinating in the "artificiality."

That's not an insult. Water resource development supports entire cities and towns. Remake of the landscape is total. When one turns on the tap, that water often comes from hundreds of miles away. Nothing water-wise is natural in the State, which—one can dream—should make it easier rather than harder to address grave political battles.

While today's California would have shut down yesterday's before it ever started, a dose of reality is required in western water policy. If ruthless, brutal drought and flood cycles—which would render most lifestyles impossible—are unacceptable, and they most assuredly are, then active water management is necessary, and is a good thing.

Western states should fund resolution of their environmental problems and water access issues without involving the far less blessed rest of the Nation, who have their own crises. If funds from are received, they should be reimbursed.

Longer term we must emphasize regulatory liberalization, environmental rationality, and, longer term, better bring California's vast delta and glacial and reservoir water resources under market systems/regimes to "balance" the warring agricultural/irrigation in lower central valley, drinking water, industrial, environmental set-asides and recreational uses.

Californian's actions show that they've accepted irretrievable change, even though, as John McPhee pointed out, there are only a handful of river deltas where two rivers combine. There is no denying the grandeur of the Central Valley, "Far more planer than the planest of plains" as McPhee put it, noting that the got there before the "mountains set up like portable screens." The Central Valley Project (CVP) irrigates three million acres, water that could come from the Delta or nearby or hundreds of miles further.

Like the natural environment, the manmade water infrastructure itself is a world wonder. The valley is the most productive agricultural economy; almonds, artichokes, everything. With pipelines and pumps traversing hills, the CVP is said to be a net producer of energy/ recapture in the Valley at CVP; that's good, what are lessons from that in terms of liberalizing infrastructure to better meet consumers' needs.

But it gets hot, and fruit trees are painted white to avoid sunburn. Geologically the Delta levees are tissue paper. The State will have to upgrade them since they aren't going to last. The State is home to the highly energy intensive tech industry; it is friendly toward high levels of immigration; its population is growing. So droughts must be managed, water better stored and allocated. Anticipation and planning matter. Policymakers' job is to prevent further derailment of bringing environmental resources and amenities into the pricing institutions of markets and property rights, regardless of the failure (universal, not just in California) of building those institutions in the past. Such regimes are too young as human institutions to have done it right.

It's one thing to argue against taxpayer dollars for unreimbursed well drilling and Reclamation plans as in the H.R. 3176 instance, and this report does that; It also advocates regulatory reforms, and environmental rationality so as to ease production. Long term, it is worthwhile and meaningful to fit this debate into the context of the context of "big assets," critical infrastructure, water pricing and access and environmental health. Rather than send money, policymakers' job is the opposite: to prevent the machinations that interrupt market clearing prices and result in shortages and misallocations.

WHAT'S IN THE RECLAMATION STATES EMERGENCY DROUGHT RELIEF ACT

Water availability is a core national infrastructure concern. The specific legislative issue in H.R. 3176, a bill reauthorizing parts of the Reclamation States Emergency Drought Relief Act, is what role the Federal Government should play in drought planning and mitigation. At the core is reauthorization to spend $15 million

in remaining funds. The original act passed in 1991, created largely because of a 6-year California drought, but the planning applies to all 50 States.

The Bureau of Reclamation says (BOR) "The Act authorizes emergency response and planning assistance that would minimize and mitigate losses and damages resulting from drought conditions."[4]

The Act itself can be summarized as follows:[5]

> *Title I: Assistance During Droughts: Allows Reclamation to undertake activities that would minimize or mitigate drought damages or losses within the 17 Reclamation States including tribes within those States, and Hawaii. Any construction activities undertaken shall be limited to temporary facilities, with the exception of well construction.*
>
> *Title II: Drought Contingency Planning: Provides for assistance in drought planning. All 50 States and U.S. territories are eligible.*

The bill is rather open-ended, providing for conducting studies and technical assistance that even includes controversial desalination projects. The "Plan Provisions" including but not limited to the below are precisely what market actors should manage, not the Federal Government as a mini-FEMA.

1. Water banks.
2. Appropriate water conservation actions.
3. Water transfers to serve users inside or outside authorized Federal Reclamation project service areas in order to mitigate the effects of drought.
4. Use of Federal Reclamation project facilities to store and convey nonproject water for agricultural, municipal and industrial, fish and wildlife, or other uses both inside and outside an authorized Federal Reclamation project service area.
5. Use of water from dead or inactive reservoir storage or increased use of ground water resources for temporary water supplies.
6. Water supplies for fish and wildlife resources.
7. Minor structural actions.

Water utilities and irrigation districts are not required to repay Federal funds used for well drilling (the bulk of support under the law) in times of drought; they benefit in perpetuity. In California, most went to the San Joaquin Valley district.

We require alternatives to this flawed program, at the very least, repayment of funds. The San Joaquin Water Reliability Act of Rep. Devin Nunes is another alternative; he stresses jobs and seeks to turn on the Delta water export pumps to former levels.[6] Fishery groups criticize Nunes for an "assault on California's fisheries and rivers" and for wanting to "seize much of the water devoted to California's fisheries and the environment, delivering it instead to the agribusiness barons of the western San Joaquin Valley."[7] In the face of such opprobrium, it is understandable that irrigation districts and utilities that receive less water owing to Delta related environmental restrictions would like the "compensation" the $15 million represents, but that is less than a band-aid particularly if the funding discourages needed conservation or is seen as a replacement for regulatory liberalization needed. So at the least, the bill should require that the funds be returned to taxpayers.

Irrigation once was a more individualized matter; the 1877 Desert Land Act that amended the Homestead Act provided for a 25 cents per acre down payment on 640 acres; the new owner would bring a portion under irrigation within three years, and could receive full title upon proof of irrigation and payment of an additional dollar per acre.[8] In that former world, one was to prove one had irrigated land oneself to receive a land grant, however fraud-riddled that was.

Make no mistake, property rights claims are a mish-mash in the West; Native Americans have rights dating back to time immemorial; the BOR to 1905; the National Wildlife Refuges to 1928 and 1964; the homesteaders have rights claims dating to whenever they first settled in the basin extending into perpetuity.[9]

Policymakers' objective should be to increasingly liberalize the marketplace, including improving the regulatory environment such that we better avoid man-made

---

[4] http://www.usbr.gov/drought/.

[5] http://www.usbr.gov/drought/102-250.html.

[6] Nunes bill http://www.gpo.gov/fdsys/pkg/BILLS-112hr1837ih/pdf/BILLS-112hr1837ih.pdf and summary; http://nunes.house.gov/uploadedfiles/legislative_summary_of_the_sacramento-san_joaquin_valley_water_reliability_act.pdf.

[7] http://blog.sfgate.com/zgrader/2011/07/25/congressman-nunes-attempt-to-destroy-californias-salmon-and-fishing-jobs/.

[8] Fite-Reese, An Economic History of the United States, 2nd Edition.

[9] Observation by CEI Fellow Robert J. Smith.

droughts; and payments under the guise of this bill at the very least should achieve that end. Longer term, subjecting water strategy decisions and investment to marketplace pressures that address competing interests will become increasingly important, and if those pressures have been subverted by past political choices, to return them to the private realm, or to make the private realm more relevant to future choices.

A FOUNTAIN OF SOLUTIONS FOR WESTERN STATES

Periodic western droughts and environmental fallout from water access policy is not unique. Rather, such issues are globally contentious. A *Wall Street Journal* book review on the "unhappy descent" of Turkey's Meander River couldn't help but invoke common laments that: [10]

> *In North America, so much water is taken out of the Colorado that it no longer reaches the sea. Nor does the Rio Grande. Or the River Jordan. Or China's Yellow River.*

Access to water in times of plenty and in times of drought is a fundamental infrastructure concern everywhere; further, the issues surrounding innovation and research in water policy are elements of broader science and manufacturing policy.

Aggravations abound locally and so do penalties. One Oregon man catching rainwater on his own property received 30 days in jail for apparently breaking a 1925 law against personal reservoirs,[11] but when scarcity and emotions run high, strange things happen.

In addition to developments like rainwater theft prosecution, water policy can be fundamentally perverse and distortionary: water supply systems may not cover their debts, operations and capital replacement needs, and as governmental monopolies, they sometimes "are used as cash cows to support more labor-intensive functions of local government, such as fire and police." [12]

Efforts like H.R. 3176, the Reclamation States Drought Relief Act, and the desalination programs this Committee has addressed add to such problems.

The first Delta levees appeared around the time of the Gold Rush so the altered landscape has long been a fixture. The Federal Government role enlarged during the Great Depression.

But impulses that foster national governmental programs that exacerbate misallocation of water and money should be resisted. That is the problem with H.R. 3176; Policymakers should subject water policy decisions, pricing, investment and conservation to marketplace pressures, alien as that may be. In the current battle that means requiring reimbursement for well drilling at the very least.

But further, streamlining permitting and competitive approaches to infrastructure and the technologies underlying it and regulatory liberalization represent "fountain" of solutions be more effective than politics at boosting innovation, enhancing consumer well-being, facilitating commerce and trade, and contributing to California's and United States prosperity.

How can we be sure? Charles Fishman, author of *The Big Thirst: The Secret Life and Turbulent Future of Water*, penned a rundown of myths about water, noting even our ignorance of where it goes upon disappearing down the drain.[13] In terms of quantity, water is actually not getting more scarce; it's constant on earth. And the salty oceans? They're actually:

> *Olympian springs of fresh water—every day, the sun, the sea and evaporation combine to make 45,000 gallons of rainwater for each man, woman and child on Earth. . . . Even in the United States, where we use water with profligacy, the oceans are making more fresh water for each of us in a month than we'll use in a decade.*

Fishman continues, "We never really use it up. Water reemerges from everything we do with it, whether it's making coffee or making steel, ready to use again."

---

[10] Alice Albinia, "A Famous River's Unhappy Descent," *Wall Street Journal*, July 23, 2012. p. A11 (A review of *Meander*, by Jeremy Seal).

[11] Kendra Alleyne, "*Man Sentenced to 30 Days for Catching Rain Water on Own Property Enters Jail*", CNS News, August 8, 2012. http://cnsnews.com/news/article/man-sentenced-30-days-catching-rain-water-own-property-enters-jail.

[12] G. Tracy Meehan III, "Flood Zones: A Market Solution to the Challenge of Water Supply," (A book review of *The End of Abundance* by David Zetland), *Weekly Standard*, July 16, 2012. pp. 36–37.

[13] Charles Fishman, "Five Myths About Water," *Washington Post*, April 6, 2012. http://www.washingtonpost.com/opinions/five-myths-about-water/2012/04/06/gIQAS6EB0S_story.html.

That's a useful insight for California's feast/famine water predicament. Water is constant; its allocation and pricing that matter, and it is regulations and environmental over-reach that often discourage properly priced supply. Shortages are not really at hand when demand has grown without price adjustments.

Water is both a necessity and a luxury good. We use more as we get wealthier, which requires more energy, which itself requires still more water. Nonetheless, overall the Nation uses less water than in the 1980s (agriculture and power remain the largest users); families use a little more than back then.[14]

But it doesn't always rain in the same places, and over time populations shift (sometimes even in response to artificially prolific water supplies). California represents the peak expression of this reality.

Challenges loom. "America's population is expected to grow by 100 million—a 30-percent increase—by the middle of the 21st century," notes Bonner Cohen in "Fixing America's Crumbling Underground Water Infrastructure."[15] And infrastructure won't be cheap. Cohen continues, "Over the next 20 years, upgrading municipal water and wastewater systems is expected to cost between $3 [trillion] and $5 trillion. Building and replacing water and sewage lines alone will cost some $660 billion to $1.1 trillion over the same time period."

There's no need for Malthusian despair, because in the face of it all, gallons of water cost Californians and Americans less than a penny. Decisions may be reacting to broader mismanagement.[16] Fifteen million seems trivial. But on the other hand, as G. Tracy Mehan, writing in *The Environmental Forum*, put it, "Scottish lawns and recreational swimming are luxury items in arid areas and should bear the cost of scarcity in the price of water. Moreover, low water rates are basically middle-and upper-class subsidies."[17]

POLICY CONTEXT: AVOID HAVING GOVERNMENT STEER WHILE THE MARKET MERELY ROWS

The Reclamation States Drought Relief Act program is counterproductive and unnecessary. When one knows the Federal Government will step in, it changes behavior. Like other interventions in free society, it changes the trajectory and risk calculus of those acting within the framework.

Economic calculation requires market signals; Federal planning approaches are extra-market and distortionary. Even without drought, economic miscalculation plagues planned systems.

We need more fresh water in estuaries, but rarely is there mention of property rights. Notwithstanding environmental battles, which often take on religious overtones, allowing price of water to fluctuate is a part of the answer. Reacting to market price of water is a means of conservation, just as in every other walk of life.

As policy discussions unfold surrounding drought preparedness and water policy generally, several challenges confront policymakers. These involve such matters as:

- Federal Spending's Distortionary Impact and the Limitations of Federal Research and Planning
- Federal Policy vs. Markets in Drought Preparedness

Federal Spending's Distortionary Impact and the Limitations of Federal Research and Planning

Subsidies like that in the Reclamation States Drought Relief Act are not merely unneeded, they can be unfair, since only certain States are involved yet all required to pay.

Funding of western water is unfair to taxpayers across the rest of the country who are far less resource-blessed. America's economy is faced not with just scarcity of water, but a scarcity of funds. Granted, the scale of projects under H.R. 3176 of a few million is not a lot of money compared to America's several trillion in Federal outlays.

While the sums involved are virtually irrelevant in the modern spending context, they matter in other ways for how California and other western States conduct water policy, and provide lessons for the rest of the Nation.

---

[14] EPA on average family use http://www.epa.gov/WaterSense/pubs/indoor.html.

[15] Bonner R. Cohen, "Fixing America's Crumbling Underground Water Infrastructure," Competitive Enterprise Institute, *Issue Analysis 2012 No. 3*, April 11, 2012. http://cei.org/sites/default/files/Bonner%20Cohen%20-%20Fixing%20America%27s%20Water%20Infrastructure.pdf.

[16] David Zetland has noted an interesting co-existence of cheap water and bad finances more generally http://www.aguanomics.com/2012/02/link-between-cheap-water-and-bad.html.

[17] G. Tracy Mehan III., "The Future of Water: Technology, Economics, Political Will," The Environmental Forum, May/June 2012, p. 6–7.

The *expectation* of funds, and the impression created in the original legislation and the H.R. 3176 reauthorization can set up unhelpful prioritization of paltry Federal dollars when far graver concerns exist for which Federal funding is not and cannot be the answer in California and the rest of the West.

More importantly, Federal spending's effects *on the nature of water research, production and conservation itself* reverberate beyond the dollars at issue. The dollars foster a "leveraging" of a negative rather than the positive kind in that parties should not look to the Federal Government and Reclamation for guidance. In the United States, private investors, localities, states and regions are the proper locus of investment to avoid the perpetuation of water policy's detachment from marketplace pressures.

Government research has been underway for decades on energy reduction, desalination, treatment of waste capture and more. In markets, research is *itself* competitive, driven by reaction to consumer needs and to what rivals do. But in typical funding legislation of which H.R. 3176 is one example, competition and rivalry aren't central, making both the goals and the methods to achieve them questionable with respect to sustainability in the proper sense of the term.

The supporters of Federal research and projects tend to be from States that would directly benefit, but of course that's the case with many government programs. Except when a local earmark or project is at stake, politicians commonly accept that government has no innate ability to pick among competing technologies using taxpayer money. Moreover, government plans operate on an election timeline that doesn't conform to market schedules, undermining efficient execution by governmental bodies on research, development and construction efforts on desalination.

Politicians cannot assign rational priorities to the stream of "significant" projects, thus they will select popular ones benefiting local constituencies; simply note the continuing funding of new libraries in the digital age (as opposed to, say, handing out wireless-enabled laptops), new post offices, and clamoring over tech programs for rural small businesses.

The hazards of a government appropriations process and the accompanying lobbying for sub-optimal projects are numerous. In the space program, entrenched contractors and legislators from flight-center districts enjoy cost overruns, and lobby against cheaper unmanned flights. An ethic of revolutionizing space flight becomes unthinkable. There's no need to recreate or perpetuate such a situation in water policy or any realm.

In the Federal R&D sweepstakes, bolstering promising technologies has been compared to efforts to improve the speed records at a racetrack by picking the R&D horses to run.[18] Beyond the technologies for generating clean water and a clean environment, however, the condition of that racetrack and the rewards available also matter. Greater "speeds" might be had by improving the track—the business and regulatory environment—and by letting "jockeys" (private investors) keep more of their earnings.[19]

The government-picking-technologies model undermines economic liberty, innovation, wealth creation, "national competitiveness" (a frequent rationale for government R&D) and consumer benefits, and is itself a source of risk. Many have argued that viable technologies don't need subsidy, and non-viable technologies probably can't be helped by one. Otherwise, we distort markets, create bubbles and tee up future rippling recessions. Rather than picking the winning horses (or worse, the Federal Government actually *being one* of the horses, which worsens the situation with water policy), government's legitimate role is to improve the track on which all the horses run; that means liberalizing the regulatory environment within which entrepreneurs operate, for starters (the Appendix offers regulatory reform alternatives).

One aspect of liberalization must be privatization of Federal research efforts rather than creating new ones as research legislation does (which itself would remove constituencies for government funding). The typical emphasis is on government spending rather than privatization. During the 1990s, it was proposed that essential military aspects of Federal labs be transferred to the Department of Defense, while commercial aspects should be privatized by offering them to the industries they supposedly benefit or by allowing research staffs to take them over via an employee buyout approach.

---

[18] The horse and track analogy appears in Fred L. Smith, Jr., Testimony before the Subcommittee on Energy and Environment, House Committee on Science, Hearings on the Fiscal Year 1999 Budget. March 24, 1998. http://cei.org/outreach-regulatory-comments-and-testimony/testimony-subcommittee-energy-and-environment-house-commi.

[19] Fred L. Smith, Jr., 1998. http://cei.org/outreach-regulatory-comments-and-testimony/testimony-subcommittee-energy-and-environment-house-commi.

Privatization of Federal research is a particularly hard sell when the topic at hand is public funding expansion. Perhaps one approach is to limit Federal funding for technologies that do not yet exist, and grow out of the problem.

Overly abundant taxpayer funding is incompatible with a future optimally and lightly regulated water sector specifically, or with limited government generally. With interventionist water policy, we already observe the seeds for new regulation created by the direct impacts, indirect impacts and externalities of the intervention itself.

Normally, America urges developing nations to embrace markets and reject government-steering philosophies for enterprises like growing wheat or making shoes. Yet we enable government oversight of advanced networks and infrastructure at home, such as water, the Federal Communications Commission's National Broadband Plan and net neutrality rules, and the heavy regulation of electricity.

Government steering and subsidies can offload technologies onto inefficient paths, and can generate artificial booms. One lesson of the telecom meltdown is that government can contribute to the inflation of unsustainable technology and research bubbles; we may be at risk of a similar "green technology" bubble now.[20] Note again that Federal legislation currently artificially favors use of renewable energies, precisely the kind of distortions being noted here. Regardless, we have a regional or state issue on our hands, not a Federal one.

Moreover, there are opportunity costs to governmental funding of technological research. Politics cannot determine optimal research portfolios: Why the mix of activities and contingency planning (like unreimbursed gifts of wells) instead of investments in permanent pipelines from northern California or from other states or corridors; or repair of leaky infrastructure; or water portage via cargo shipping? Or other options.

We can lessen burdens of the inevitable drought and flood periods while avoiding the distortions and bubbles created by governmental steering undisciplined by markets. The dilemma is by no means special with regard to water. In other sectors, why might we witness a National Nanotechnology Initiative and a National Broadband Plan, instead of a biotech agenda? Why not space travel, robotic asteroid mining, or more dollars for fuel cells and the hydrogen economy? The proper emphasis for research is impervious to political resolution. Political dominance of production can and will create entire industries, even an economy, disconnected from actual consumer demands and preferences.

Of course, no political party is immune from channeling Federal dollars to districts in defiance of scientific or economic merit. Problems arise when the Federal Government heavily involves itself in the very production of knowledge itself rather than in laying the legal, property rights, and contractual foundations of new commercial endeavors.

Policy ought not to disconnect research and planning from the voluntary market process. Policy can advance human welfare and remain most relevant when pulled into being by the actual needs of mankind, including practical ones; that best occurs in private-sector investment as opposed to taxpayer funded.

Congress continually revisits the question of what the Federal Government should be doing; but rather than embrace the invitation to expand spending on damsel-in-distress endeavors (obviously Washington can't fund every crisis resolution in every state), Congress should foster private research (primarily via economic liberalization) rather than appropriate funds or steer research and investment.

A bit of the "broken window fallacy"[21] comes into play here: we may see H.R. 3176's "ceremony" and ribbon-cutting, but not seen is the alternatives neglected thanks to the redirection of resources and changed behavior.

Furthermore, it is inappropriate for network industries to all remain walled off from one another in a legislative appropriations environment whether for commercial purposes or with respect to "critical infrastructure" security goals. When governments set the agenda it undermines the swirling competition, cooperation, and "coopetition" needed for U.S. economic health, such as hypothetical alliances with other network industries for, say, water transport and storage options.

Outcome-oriented Federal interventions as opposed to broader liberalizations that leave outcomes up to the choices and dispersed knowledge of others will produce prominent successes that advocates can point to, but fall short taken as a whole and

---

[20] Spain's King Juan Carlos University released findings that each "green job" created by the Spanish wind industry cost four other jobs elsewhere. "The Big Wind Power Cover-Up," *Investor's Business Daily*, March 12, 2010. http://www.investors.com/NewsAndAnalysis/Article.aspx?id=527214.

[21] See Frederic Bastiat, "That Which is Seen, and that Which is Not Seen," 1850. http://bastiat.org/en/twisatwins.html.

compared to the potential. Policymakers could easily use the $15 million provided in H.R. 3176 to "prove" how great it was that Washington spent it, but what a interventions, subsidies, and regulations create an economy made up of suboptimal entities and approaches (in this case water infrastructures and all the attendant social and environmental ills that may resemble what they would under enterprise). Those inefficiencies will propagate throughout the economy and over the years. Unpreparedness for drought is one of those results.

Federal Policy vs. Markets in Drought Preparedness

Scarcity of water itself in a free, highly mobile society like the United States—if that is what drives political fights and intervention—is a creature of poor policy. We ought to recognize the true causes of scarcity and drought unpreparedness, and avoid perpetuating the "Declaration of *De*pendence" on Federal dollars and decisions that affects some of America's most crucial infrastructure industries and technologies.

Conversely, however, even if the private sector did not invest "enough" in research like that authorized in H.R. 3176, that too is reason for Federal restraint. States reliant on the process may have a role, but that's their business and their prerogative to fund (although State funding can be similarly vulnerable inefficient.)

Indeed, water markets are hardly free ones. Because of heavy governmental involvement and the distortions and shifting of relative pricing it creates, it's not even clear in every case of private sector investment that it should be doing so particularly if subsidies or grants are the impetus.

The costs and benefits of water policy decisions should always be as explicit as possible, never obscured. Policy must never mask the otherwise necessary confrontation of underlying water scarcity and the reality of recurring drought, which exacerbates problems and induce calls for Federal intervention.

Federal and local policymakers' primary task, as distinct from programs like the H.R. 3176, should be unwinding of interference with water price signals so that private investors can react and build the robust critical infrastructure actually needed, the scale of which could be far beyond today's infrastructure, perhaps founded upon business models not contemplated today.

Those price signals should incorporate mitigation of state actors' own potential negative environmental impacts, as property-rights based production demands. Among much else, such market pressures can do a better job compelling a polluter to internalize or treat waste streams, and to conserve for the inevitable drought stretch better than H.R. 3176's studies and planning.

Diverting energy and effort into policies that may further disguise real prices by spreading costs to non-involved taxpayers, such as H.R. 3176 does with well drilling will further delay any needed general or specific reckoning with the way water is marketed and priced in California and the Reclamation states (and by extension the United States) and will aggravate environmental disputes. Bearing burdens and dealing with "externalities" is a critical yet normal part of well-functioning markets. Prince signals matter: Better sometimes for the water to cost more and reduce demand and usage.

Bolstering industry requires vigorous competition among ideas for private funding. The national government's role in actually fostering such knowledge wealth is limited, but its role in liberalizing the American economy so that *others* can foster that wealth is a profound responsibility, perhaps the primary duty of government.

Separation of State and Water: Options for Expanding Reliable Water Supplies

A few non-exhaustive options for improving water supply follow. These are alternatives to the Reclamation States Drought Relief Act approach.

Infrastructure Advances and Other Innovations

Markets in infrastructures matter. Innovation and basic research itself do not proceed in isolation in genuine markets. Economic sectors can inform and enrich one another, making it advisable to tear down regulatory silos artificially separating infrastructure industries and better exploitations of rights-of-way (water, power, communications, transportation) wherever possible so that knowledge, ideas, products, and collaboration—and water—flow more freely.

As a free society becomes wealthier, creation of infrastructure for needs like water should become easier, not harder. The America of 100 years ago that built overlapping, tangled infrastructure with a developing-world-level GDP can build today's, if allowed. Well-functioning capital markets already *are* our "infrastructure bank." Energy infrastructure, communications infrastructure, electricity infrastructure, the infrastructure capabilities of the water sector—all would benefit far more from a

concerted deregulation and liberalization campaign than government spending and research. Pushing politically favored infrastructure projects while leaving 19th and 20th century infrastructure and antitrust regulation intact, undermines the goals of legislation like the Reclamation States Drought Relief Act. (The Appendix, "Economic Liberalization: An Alternative to Government Spending In Service to Water Abundance" presents such an outline.)

The pricing of regulated-utility water will frequently diverge from the optimum, compounding allocation and availability problems over time. In any event, without advocating for any particular alternative, and while stressing the underlying issue of water's character as a non-competitive, non-market enterprise out of sync with the modern world, other infrastructure expansion approaches could be appropriate, and would benefit from regulatory liberalization. These include:

- Better transport, including pipelines/aqueducts/trucking/shipping: Advances among these matter and change economics drastically, particularly if other network industries with rights of way collaborated far more than they do today.[22] Crude oil carriers can be converted to water carriers.[23]
- Greater stored supplies in the event of levee breach and drought; more efficient collaborative use of reservoirs and capturing of runoff.
- Trade: Relatedly, trade allows for coping with competing priorities and grappling with scarcity. G. Tracy Mehan for example notes that "[E]merging water markets allow . . . for trades between cities, farmers, and even NGOs such as Trout Unlimited."[24]
- Gray/wastewater treatment and reclamation is an alternative for sourcing, for agriculture and industry if not for drinking, taking pressure off the latter.
- Improvements in stormwater harvesting techniques.
- Conservation: Anderson and Snyder in *Water Markets* note that "Markets are providing agricultural and urban users with more reliable supplies and with an incentive to conserve, and are enabling environmentalists to purchase instream flows to protect fish and recreational opportunities."
- Unleash affordable energy: There is no workaround for the fact that Federal and State policies disdainful of conventional energy are inconsistent with the presumed goal in proposed Federal legislation of advancing access to water. Reducing onerous energy regulations would reduce economic uncertainty and enhance water markets.

President Obama and others have suggested a desire to boost antitrust enforcement.[25] That's unfortunate. Instead, policymakers should relax antitrust so that firms within and across industry sectors can collaborate on business plans to bring infrastructure wealth to a higher level, including water infrastructure. Markets require competition, sometimes merger, and sometimes merely the kind of cooperation or "partial merger" often miscast as damaging collusion.

Reduction of Water Waste and Improved Contracting

Another "alternative" alongside regulatory liberalization is to avoid wasting existing supplies. Regulatory and tax relief in the industry can aid this endeavor. And ending such waste might be a condition of receiving H.R. 3176 funding. Bonner Cohen notes that leaking pipes alone cost 17 percent[26] of the annual water supply:

> *Water main breaks and leaking water supply pipes cost American taxpayers billions of dollars every year in lost water and repair costs. Necessary upgrades promise to place additional stresses on taxpayers long into the future. Building and replacing water and sewage lines alone will cost some $660 billion to $1.1 trillion*.[27]

Repairs can sometimes be cheaper than other funding schemes. Cohen further notes that changing inefficient policies such as restrictions on PVC pipe use, and emphasizing competitive procurement bidding for crumbling underground infra-

---

[22] See introduction in Adam Thierer and Wayne Crews, *What's Yours Is Mine*, Cato Institute: Washington, D.C. 2003.

[23] Noted in Wikipedia's entry on desalination, http://en.wikipedia.org/wiki/Desalination.

[24] Mehan, May/June 2012.

[25] http://www.nytimes.com/2009/05/12/business/economy/12antitrust.html?_r=1&adxnnl=1&adxnnlx=1268514088-MohE/8/mpcqIAEXJNqJ1JQ.

[26] Cohen, 2012, p. 4.

[27] Cohen, 2012, p. 3.

structure,[28] and particularly privatization, can save great sums.[29] Such forms of non-market inertia make ordinary infrastructure more costly than it needs to be and may improperly inflate the appeal of costly projects.

Streamline General Regulatory Burdens

Permitting nightmares and other regulations that can make it an overly difficult process to construct and operate water infrastructure should be reviewed and relaxed,[30] particularly since legislation often would paradoxically promote regulation of the technology and its byproducts.

Government funding like that in H.R. 3176 too often invites regulation. Regulatory concerns propel government regulatory oversight of the technology when Federal dollars become involved; the thrust becomes one of government funding projects yet endlessly studying and regulating their risks. Since recipient businesses and contractors can become so dependent on political funding, they go along with the oversight, cutoff from envisioning alternative approaches to either securing funding or managing hazards. The Valley just wants its water and could be seduced into acquiescing to unnecessary rules.

Options for general reform of regulatory policy in the Appendix.

Taxpayer Funding Misdirects Resources by Prolonging Inefficient Projects

Markets have to be good at killing bad projects as well as at creating new ones.[31] Governmental programs like the Reclamation States Drought Relief Act are less capable of systematic pruning.

Once entrenched virtually all interested parties seek to grow government rather than pull the plug on exhausted or ill-considered funding projects, from relatively tiny ones like H.R. 3176's few millions to the gargantuan like the Superconducting Supercollider. The result is higher taxation and dollars directed to multiplying, uncoordinated ends. Science resembles any other rent-seeking interest in this respect. In testimony before congressional panels, most seek more money, not less; more government rather than less.

In proposing an end to the Advanced Technology Program years ago, Michael Gough offered a real test of taxpayer support: "Let the government give taxpayers who want to invest . . . a deduction from their income . . . [and] share in any profits that flow from it. That's what taxpayers get from private investments. It's not what they get [when government] takes tax money . . . and invests it in private enterprise."

Salt Water Distillation to Freshwater

One approach specifically referred to expanding supply to in H.R. 3176, the Reclamation States Emergency Drought Relief Act, is desalination, or the removal of salt (sodium chloride) from seawater or brackish water to render it fit for human consumption or other uses.

The problem is that Desalination at bottom is an energy-intensive, by-product-laden means of making expensive potable water. And given its energy intensity, more expensive electric power is a factor undermining its prospects. Higher electricity prices would cause "less electricity-intensive" substitutes like conservation, water purchases, and pricing changes to rise in relative importance.[32]

Still, desalination may have a role to play but probably not the one envisioned in the Reclamation States Emergency Drought Relief Act.[33] If we are to judge by private sector involvement, desalination is on a trajectory to become increasingly cost-effective for certain applications, particularly as water prices respond to market signals as demand for fresh water increases. Public and private investment overseas

---

[28] Cohen 2012.

[29] For example see Leonard Gilroy and Harris Kenny, Annual Privatization Report 2010: Water and Wastewater, Reason Foundation, May 2011. http://reason.org/files/water_annual_privatization_report_2010.pdf.

[30] "Substantial uncertainties remain about the environmental impacts of desalination, which have led to costly permitting delays." The National Academies' Water Information Center, Desalination: A National Perspective, 2008. http://dels-old.nas.edu/water/dyn.php?link_id=5291&session_id=0kqg3jkjuqrkq740sim7g15b77.

[31] Auren Hoffman, "To Grow a Company, You Need to Be Good at Killing Things," *Summation*, February 21, 2010. http://blog.summation.net/2010/02/to-grow-a-company-you-need-to-be-good-at-killing-things.html.

[32] Congressional Research Service, August 15, 2011. p. 3.

[33] Clyde Wayne Crews Jr., House of Representatives Testimony, Gov't Role in Investment, Water Desalination Policy, May 23, 2013. http://www.scribd.com/doc/143263731/Wayne-Crews-House-of-Representatives-Testimony-Gov-t-Role-in-Investment-Water-Desalination-Policy-May-23-2013.

where the incentives line up differently probably inform domestic policy better than anything H.R. 3176 could do.

Desalination at bottom is one category of purification; some industries require even higher purities of water than desalination would create, conduct substantial research, and pay the price to achieve purity. Water augmentation, driven by industrial needs, is where the advances are most likely to be most efficient and broadly informative. Lessons from this sweep of experimentation are transferable and more on point than H.R. 3176.

Address Environmental Concerns With All Interests Involved

Environmental concerns plague virtually every project of any kind. Ironically, governments often alter environments and generate environmental problems. Environmental impacts of subsidized desalination in H.R. 3176, for example, such as the impact on aquatic creatures and the uncertainty over numerous options for disposal of waste streams, are the very types of impacts that in other contexts like pipelines and fracking are deal breakers.

It is more than understandable that irrigation districts and utilities would appreciate the funds in H.R. 3176 to in a sense "compensate" for failure to deal with excesses of the Endangered Species Act that have restricted their access to water. Their frustration is understandable; it is a constant debate of how much water to leave in streams for environmental purposes vs. how much to allocate to urban, agricultural and recreational uses when the right answer depends upon how much precipitation happens, which varies.

Free enterprise can excel at managing environmental risks and waste streams when given a chance. In normal markets, before firms can attract investors and launch, disciplinary institutions like liability and insurance must be secured. One must satisfy many stakeholders, including capital markets, insurers, upstream business suppliers, horizontal business partners, downstream business customers, consumers, public and global markets. And environmental interests; property rights mean one must not pollute a neighbor's property.

The Endangered Species Act is at the root of California water disputes; farmers and southern Central Valley would have the water they need if the pumps at the Sacramento/Joaquin delta were turned on, as dramatically pointed out by Rep. Nunes. and others. State Water Contractors General Manager Terry Erlewine said: [34]

> *This year is proving to be another example of why the current system is unreliable and unsustainable. The water supply for 25 million people and millions of acres of farmland depends on where a few dozen fish are located in the Delta's sprawling waterways. Until we build a better infrastructure system that protects both fish and water supplies, we're forced to operate under regulations that have high costs for California's public water agencies, farms and economy, while producing little if any benefit for the fish.*

Fifty mayors from the San Joaquin Valley also wrote a letter to President Barack Obama to observe the impact of the water rules in California. And Association of California Water Agencies Executive Director Timothy Quinn: [35]

> *We have the wrong infrastructure in the Delta, and it's been apparent for decades. . . . Conveyance improvements, coupled with habitat restoration and other measures to address Delta stressors, can get us out of this cycle of conflict and on the road to a water system that works for the economy and the environment.*

One big problem with allowing the Endangered Species Act to interfere with California's water needs is that it isn't clear that water use as opposed to other factors is the cause of the problem. Ballast discharge has been blamed; ammonia from waste treatment has been blamed.

The second big problem is that the ESA doesn't work. Over 2000 endangered species are listed; As of September 2012, only 56 had been delisted: 28 due to recover, 10 due to extinction.

The ESA's punitive nature makes it particularly bad at enlisting landowners in the effort to save species with incentives.

Apart from the Federal Government's worsening the problem, conservationists, biologists policymakers have the actual decisions about banking species, farming them, relocating them, "sponsorship" programs, habitat restoration and other creative options, likely themselves prevented by the act. There are alternative approaches that deserve consideration, such as a "salmon certificate" system proposed

---

[34] http://www.acwa.com/news/delta/water-supplies-curtailed-once-again-protect-delta-smelt.
[35] Ibid.

in a 1999 Washington Policy Center paper that makes economic and environmental tradeoffs more clear.[36]

Unless California wants to go back to unmanaged droughts and floods, they are going to have to accept infrastructure and perhaps projects like the Bay Delta Conservation Plan, *especially* if they value is the environment. The population is going to grow; levees will fail.

Better Pricing of Water Supplies

As Adam Smith and the classical economists teach, water and diamonds have vastly different marginal and total utilities.[37] Each can be worthless or priceless under different circumstances. Both the supply side of life and the demand side of life matter across the board.

Long term, we should embrace the opportunity to solve more than one problem at a time when it comes to integrating flood management with water supply planning. The need to pay for one's own wells has been mentioned, since more Federal dollars delays having to deal with bigger problems, like the need to change permitting regulations, use more groundwater in drought years, create new insurance products, and create alternatives to the Endangered Species Act that actually—brace for it—save species. This requires enlisting the property owner and downstream consumer in positive ways.

Water utilities are usually sourcing-to-delivery monopolies, rarely subject to market forces. Problems with efficient investment exist in such models, as do disincentives of local elected officials to tolerate the rate increases that a market would dictate and perhaps implement.

The state of play is reviewed in books like *Water Markets: Priming the Invisible Pump* by Terry L. Anderson and Pamela Snyder, which surveys water law and how water markets have emerged in the United States, "including discussion of the restrictions by state and Federal governments, which increased over the past century."[38]

Steve Maxwell in *The Future of Water* makes an important note about a sometimes overly casual attitude toward the miracle of easily available fresh water: "The most important job utilities around the world may have in the coming decades is convincing people that water is valuable—and that it is reasonable to pay more for this luxury than the bargain prices we have traditionally taken for granted."[39]

In reviewing top water expert and researcher David Zetland's book *The End of Abundance*, G. Tracy Meehan summarized: "[T]he water sector can encourage better stewardship and a greater degree of social harmony by substituting pricing and market allocation of limited water supplies for political management."[40]

Water isn't unique in widespread inefficient pricing and allocation, of course: anything politically or bureaucratically managed can be vulnerable to quantity and pricing shocks and constraints. Where water prices are artificially low, shortages will result. The chapter "Why Water Crises?" in *Water Markets: Priming the Invisible Pump*, by Anderson and Snyder, describes the price mechanism's essential role in preventing crises:[41]

> *Higher water prices would also reduce the need to build costly supply projects and delivery systems that dam and divert free-flowing streams. Higher prices would encourage private, profit-making firms to enter the water supply industry, taking the burden off the public treasury. If the price mechanism were allowed to operate, demand could be reduced, supply could be increased, water would be reallocated, and water crises would become obsolete.*

Proper pricing is an "alternative" to "costly supply projects."

Similarly, David Zetland notes that "Shortages can be ended much more quickly by a change of incentives than supply side actions to build a desalination plant or

---

[36] http://www.washingtonpolicy.org/publications/brief/saving-our-salmon-using-free-market-protect-environment.

[37] See also G. Tracy Mehan III. and Ian Kline's reference to the same in "Pricing as a Demand-Side Management Tool: Implications for Water Policy and Governance," Journal of the American Water Works Association, February 2012. pp 61–66.

[38] Terry L. Anderson and Pamela S. Snyder, "Priming the Invisible Pump: Water Markets Emerge," *PERC Policy Series No. 9*, February 1997. Property and Environment Research Center, http://www.perc.org/articles/article198.php.

[39] Cited in Mehan, May/June 2012.

[40] Mehan, May/June 2012.

[41] Terry L. Anderson and Pamela Snyder, Water Markets: Priming the Invisible Pump, Cato Institute: Washington, D.C., 1997. p. 11.

transfer water from neighbors who probably can't spare a drop."[42] As it stands, the realities of non-scarcity pricing of water and of permitting and approval barriers seem to defy the vision of legislative instruments. As Zetland puts it in a hypothetical context regarding supplying California's municipal needs via desalination:

> *But if it's possible to get approval for this kind of project and raise prices so far, why not just raise prices and skip the project? Higher prices would leave more water for nature, save a lot of money, and still leave humans with adequate supplies. . . . [T]the policies affecting supply and demand are more important for ending shortages than technology*.[43]

As a longer term vision in a very complex world, we need to attune competitive markets more thoroughly to the task of discovering the value of water itself.

Politically expanding a fundamentally scarce and poorly priced supply of a resource like water in less-blessed places seems to have entrenched artificial new problems and can encourage difficult-to-sustain migratory and settlement patterns. Such perverse incentives echo the policy of Federal flood insurance for continuously building on hurricane-prone areas after consecutive knock-downs. Policymakers shouldn't make it artificially attractive for more people to move into areas like arid regions. That would be create perverse justification for legislation, and worse, would sow the seeds "necessitating" more legislation years hence.

CONCLUSION

Like many industries, water policy often suffers from too much government.

Occasionally the problem isn't market failure, but the failure to have markets. "Doing something" about legitimate water needs is not the same as spending money and initiating governmental research and coordination. When linking innovation to human needs and promoting infrastructure, markets trump the legislative process—and where they don't, policy should shift to ensure that they can.

America's great infrastructure firms are segregated into regulatory silos (telecommunications, electricity, water, sewer, cable, railroad, airline, satellite, air traffic control, roads). In a freer market, they could collaborate to expand infrastructure wealth development and boost environmental amenities, but it would require a mindset different from the constricted legislative one that sets terms today.

Interestingly, the dollars allocated to water in the various Federal acts over the decades seems to total perhaps a few billion. Removing barriers to private research and manufacturing and infrastructure could yield far greater gains than relying upon appropriations that invite rent-seeking and that may threaten safety and environmental improvements. Government's proper stance is one of benevolent indifference or neutrality, since many technologies, most not in existence yet, will always compete for scarce investment dollars whether the projects are small scale or grand infrastructure.

Congress has a far more important job to do that it can't escape by sprinkling cash around as in H.R. 3176. As discussed in *Still Stimulating Like It's 1999: Time to Rethink Bipartisan Collusion on Economic Stimulus Packages*,[44] there exists a natural tendency toward stagnation when government fails to perform its "classical" function of ensuring that prices of materials, labor and other inputs aren't distorted by interference in the economy.

With water supplies, we have, not a funding problem, but a larger resource management problem. As David Zetland summarizes in *The End of Abundance*:

> *The end of abundance means the supply side/cost recovery model of water management no longer delivers the results we want, but that model still dominates the business—from California to China, Florida to Fiji—and it will cause trouble until we change the way we manage water. Economics offers an alternative focus on balancing supply and demand*.[45]

Unlike Zetland, I don't think there needs to be an end to abundance. Markets expand output in tangible products and intangible services. They also help maximize the production of useful information—including research and scientific information about technologies whose applicability is uncertain yet holds promise for people and the environment.

---

[42] David Zetland, *The End of Abundance: Economic Solutions to Water Scarcity*, 2011. p. 6.
[43] Zetland, *The End of Abundance*, p. 183.
[44] Wayne Crews, *Still Stimulating Like It's 1999: Time to Rethink Bipartisan Collusion on Economic Stimulus Packages*, Competitive Enterprise Institute, February 2008. http://cei.org/cei_files/fm/active/0/6425.pdf.
[45] Zetland, *The End of Abundance*, p. 6.

The task is to bring modern water resources further into the market process, and to lay the groundwork for tomorrow's discoveries and advances to be informed and funded by market rather than political processes. Reauthorizing Federal water projects would do the opposite in many respects. It will take legislation of a different form than H.R. 3176 to address the underlying boom/flood and bust/drought problems in water supply.

Appendix: Economic Liberalization—An Alternative to Government Spending in Service to Water Abundance

We've noted some specific hazards of government steering the market. We need alternative approaches—other than Federal spending—to advance science and manufacturing, of which water infrastructure an example. Such approaches involve fostering a general business environment wherein a private sector flush with health can fund its own research and ventures. There is a need for cataloging and limiting Federal over-regulation to foster a wealthier economy, one capable of carrying out an array of research regimes with less temptation to seek an ear in Washington.[46]

Sunset Regulations and Implement a Regulatory Reduction Commission

More than 60 departments, agencies, and commissions issue some 3,500 regulations a year in thousands of *Federal Register* pages (documented in *Ten Thousand Commandments: An Annual Snapshot of the Federal Regulatory State*.[47]) Costs of regulations are estimated to top $1 trillion annually. Congress should implement a bi-partisan "Regulatory Reduction Commission" to survey existing rules and assemble a package to eliminate with a straight up-or-down vote, no amendments allowed.

Require Congressional Approval for Major Business Regulations

Of 3,500 annual regulations, 100 plus are "economically significant." These rules should require an expedited congressional approval before they are effective. Apart from the competitiveness and innovation issues at issue in legislation, the delegation of legislative power to unelected agencies has long needed attention.

Perform Basic Deregulatory Housekeeping

- Re-discover federalism, that is, circumscribe the Federal role regarding investment and regulatory matters best left to States and private enterprise. Congress should look at what the Federal Government does that it could eliminate, or that States could do instead to provide a research and manufacturing boost.
- Improve the ethic of quantifying regulatory costs and selecting the least-cost compliance methods.
- Codify the executive order on "Regulatory Planning and Review" (E.O. 12866), or, Reagan's E.O. 12291, which provided for more external review.
- Require OMB's Regulatory Information Service Center to publish details on major and minor rules produced by each agency and strengthen its oversight.
- Reinstate the *Regulatory Program of the U.S. Government*, which formerly appeared routinely as a companion document to the Budget.
- Declare *Federal Register* notices as insufficient notice to small business.
- Hold hearings to boost the scope of the Small Business Administrations' "r3" regulatory review program.
- Lower the threshold at which a point-of-order against unfunded mandates applies.
- Implement a supermajority requirement for extraordinarily costly mandates.
- Lower the threshold for what counts as an "economically significant" rule, and improve explicit cost analysis.
- Explore, hold hearings on, and devise a limited "regulatory budget."
- Establish an annual Presidential address or statement on the state of regulation and its impact on productivity and GDP.
- Sunset regulations after a fixed period unless explicit reauthorization is made.
- Publish data on economic and health/safety regulations separately.
- Disclose transfer, administrative, and procedural regulatory costs.
- Explicitly note indirect regulatory costs.

---

[46] More detail on the suggestions here appear in Wayne Crews, "The Other National Debt Crisis: How and Why Congress Must Quantify Federal Regulation," Competitive Enterprise Institute, Issue Analysis 2011 No. 4. http://cei.org/sites/default/files/Wayne%20Crews%20-%20The%20Other%20National%20Debt%20Crisis.pdf.

[47] http://cei.org/sites/default/files/Wayne%20Crews%20-%2010,000%20Commandments%202011.pdf.

- Require agencies and the OMB to recommend rules to eliminate rules and to rank their effectiveness.
- Create benefit yardsticks to compare agency effectiveness.

Implement Annual Regulatory Transparency to Accompany the Federal Budget

In attempting to implement economic liberalization for the wealth-creating sector, a "Regulatory Report Card" should be part of the basic housekeeping just noted.

Regulatory Transparency Summary. . .with five-year historical tables. . .

- Total major ($100 million-plus) rules and minor rules by regulatory agency.
- Numbers/percentages of rules impacting small business.
- Numbers/percentages featuring numerical cost estimates.
- Tallies of cost estimates, with subtotals by agencies and grand total.
- Numbers and percentages failing to provide cost estimates.
- Federal Register analysis: pages, proposed, and final rules by agency.
- Most active rulemaking agencies.
- Rules that are deregulatory rather than regulatory.
- Rules that affect internal agency procedures alone.
- Numbers/percentages required by statute vs. rules agency discretionary rules.
- Rules for which weighing costs and benefits is statutorily prohibited.
- Detail on rules reviewed by the OMB, and action taken.

Mr. MCCLINTOCK. I want to thank all of the witnesses for their testimony. We will now go to questions by the members. Each member will have 5 minutes and may be submitting additional questions if they can't get all of them in during the constraints on the time.

The Chair will begin, and I would like to begin with the Tipton bill. Mr. Corbin, Mr. Parker, and Mr. Porzak, each of you have highlighted attempts by the administration to expropriate water rights that are recognized under State law by various types of water users. Heavenly Mountain Resort near Lake Tahoe in my district employs about 1,215 people. The jobs are contingent on the availability of millions of gallons of water annually that are held by the ski area to make snow. I know the loss of that privately held water would be catastrophic for the local economy.

Mr. Corbin, representing a ski area in the second-nicest part of the country, I wonder if you could tell us what impact this would have on the resorts in your ski area.

Mr. CORBIN. Thank you, Mr. Chairman. I appreciate it. And I have worked in Tahoe, as well the Rockies, so I view them both quite fondly.

Mr. MCCLINTOCK. Why in the world would you go to the Rockies? Have you no ambition?

Mr. CORBIN. I have been in the Rockies and then worked at Northstar, sir.

If we were to lose our water rights and literally lose the use of that water we would be very severely impacted, both operationally and financially, as I alluded to earlier. It is very key for us to make sure that we have adequate snow in the opening of the season, for example, Christmas holidays, and likewise in the spring season.

Our business of offering winter recreation is really one done in 120 days, and if we lose any significant portions of that because we don't have adequate snow, then we would be very severely compromised. Guests would not have a good experience, we might not have an adequate base for people to ski on, we might not then last

an adequate number of days to basically cover our sort of fixed cost, if you will——

Mr. MCCLINTOCK. So basically what is at stake with the Federal Government taking these water rights as a condition of special use permits for you to use Federal land is the resorts and the economy that they support would be severely impacted, perhaps to the point of closing down?

Mr. CORBIN. We would be very severely impacted, yes, sir.

Mr. MCCLINTOCK. And, Mr. Parker, what about your operations?

Mr. PARKER. Yes, and I am going to be specific to Utah here, and you can extrapolate this across the public land West. But if you take Utah as an example, livestock agriculture makes up about 75 percent of our farm gate sales. Agriculture and food in Utah is a $17.5 billion industry, making up 14 percent of the State's GDP. It provides 80,000 jobs—this is just Utah, this is 1 of the 12 public land States—provides 80,000 jobs and about $2.7 billion in wages. And the foundation of that is sheep and cattle grazing on the public land. So it would be very problematic to our State's economy.

Mr. MCCLINTOCK. So, Mr. Porzak, if I wanted to shut down these operations, destroy the economies in the local communities, is there a more effective way of doing that than demanding that the local ski resorts turn over their water rights as a condition of continuing to operate?

Mr. PORZAK. A more effective way is just to deny the special use permit. You are effectively doing the same thing. Two practical issues——

Mr. MCCLINTOCK. Well, essentially we are giving you the right to continue to operate but taking away the means of doing so, is that essentially it?

Mr. PORZAK. That is correct. And just one practical matter is that the water rights are valuable assets, and they are collateral for the operation loans for the ski resorts. So if you take away that asset, you have destroyed the collateral for that loan and undercut the ability to obtain that loan.

The other factor is that, as I mentioned, the ski industry collectively has spent hundreds of millions of dollars to develop these water rights. If they know that the Federal Government is just going to take those water rights away from them, you have destroyed the incentive for that investment, and that investment is the driving force for that ski area and then in turn the local economy.

Mr. MCCLINTOCK. OK. Very briefly, turning to Mr. Crews, all of our water projects have been based or at least are supposed to be based on a beneficiary pays principle, meaning the Federal Government will front money, but ultimately the local water users will repay it through the water that is purchased. The DeFazio bill obviously is simply grants by Federal taxpayers to local water users. Is there a better way of providing the programs financially?

Mr. CREWS. Yeah, if you are going to do it, surely the beneficiary should pay. And in programs like that the wells are drilled and in perpetuity those wells get to be maintained in that area. Ideally you would have those——

Mr. MCCLINTOCK. Hold that thought. I will get back to you. My time is out.

Mrs. Napolitano.

Mrs. NAPOLITANO. Thank you, Mr. Chairman.

Well, Mr. Willardson, why is the Federal drought planning important?

Mr. WILLARDSON. Well, as I mentioned, the Bureau of Reclamation controls a lot of water in the West. This bill also provides it with authority to provide help to the communities that cannot otherwise help themselves, as well as to provide for assistance to Indian tribes. Under the drought planning authority that has helped Arizona develop its drought plan, as well as the State of New Mexico and the State of Hawaii. They have also assisted the Hopis, the Navajo, the Zunis, and also the Hualapai in Arizona, in the Southwest, in development of drought plans.

Because of the situation with the Bureau of Reclamation and as you are intimately familiar in the State of California with the coordinated operation of the State Water Project and the Central Valley Project, there are limitations on the ability of the Bureau to move nonproject water, and that authority is also provided through this bill.

And one other important fact is——

Mrs. Napolitano. Quickly.

Mr. WILLARDSON [continuing]. This legislation exempts those kinds of contracts from restrictions of the Reclamation Reform Act with respect to acreage, and it does require that water provided by the Bureau be repaid with interest, including a portion of the capital costs.

Mrs. NAPOLITANO. Would you explain briefly please, because my time is running out, what would happen, what would be the impact on States—California is a donor State, we give more taxes than we get back, that said—if the Drought Relief Act was not reauthorized.

Mr. WILLARDSON. I think you would see a very limited ability for the Bureau of Reclamation to participate in State drought planning and response activities, and that would have a significant impact, primarily on those small and local communities and disadvantaged communities.

Mrs. NAPOLITANO. Do you have any comment as to what some of the States are currently planning, the Western States, to effectively look at how drought is going to be affecting them, since we are running into drought cycles?

Mr. WILLARDSON. There are a number of things that the States are trying to do. Obviously conservation and more efficient use is key to any of our water issues. Also, the development of other storage alternatives, groundwater management. They are trying to diversify their portfolios, water reuse and recycling. Desalinization is something that California and Texas have goals to provide water.

So there are many different areas on both the supply and the demand side that impact us not only in drought, but obviously in trying to increase the reliability of future supplies.

Mrs. NAPOLITANO. Thank you. And there are some concerns as to infrastructure itself. It is guesstimated that there are 22 water main breaks a day, which lose as much water as we normally would use.

Mr. WILLARDSON. Infrastructure and aging infrastructure is a huge challenge in the West and elsewhere.

Mrs. NAPOLITANO. Right.

Mr. Corbin, we understand the Forest Service is in the process of developing or was in the process of developing a new directive to be released this fall, but what is the urgency of moving this legislation now and why not work with the Forest Service to solve the issue administratively? And I say that because I have had issues with some of my transportation folks, with some of my water agencies. And I work with the administration, the agencies bring them to the table and say, OK, sit down and try to figure it out and let us know where we can help, but certainly as much as we can stay out of their way.

Mr. CORBIN. I think it is urgent because indeed this process of rulemaking has been going on for some time. And in the course of that we have previously seen proposed rules that indeed have been, I think, very harsh with respect to our industry. We have previously offered compromise to the Forest Service suggesting that indeed if the stated goal is to protect water for use in the permit areas——

Mrs. NAPOLITANO. Is this before or after the directive was put out?

Mr. CORBIN. This compromise was proposed this past summer, following the 2012 directive, yes. And it was a compromise suggesting that the water could be, in effect, protected for use within the permit areas simply by going ahead and having the permittees recognize that we would provide water if it were necessary for some action we requested approval of, and subsequently, if we were to sell and transfer our permit, that we would offer it indeed to the subsequent transferees so it would stay with the ski area. If that transferee did not want the water, we would offer it to the local government; if not them, the Forest Service. So we have already suggested a compromise.

Mrs. NAPOLITANO. Thank you. My time has run out. I will look for a second round.

Mr. MCCLINTOCK. Great. Thank you.

Mr. Tipton.

Mr. TIPTON. Thank you Mr. Chairman.

And I think what I would like to start out with is, Mr. Willardson, I know you were here to be able to testify on H.R. 3176, but since you are with the Western States Water Council, maybe briefly could you say are you supportive of the Water Rights Act bill that we have.

Mr. WILLARDSON. The Council has not addressed the bill or taken a position, but I can tell you on my reading that it is very consistent with our long-term support for protecting State-granted private property rights, and I would expect that we will be sending a letter in support of the legislation for the record.

I would also note that we are working with the Federal agencies in what we call our Federal Agency Support Team, including the Forest Service, to identify potential needs of the Federal agencies and how those needs can be met within State law.

Mr. TIPTON. Great. Well, I truly appreciate your support for State rights and private property rights. And I would like to follow up a little bit in terms of the question of my good friend, the Rank-

ing Member's question in regards to the urgency of being able to pass this legislation and to be able to have it move forward.

And, Mr. Corbin, Mr. Porzak, perhaps you would like to be able to address this.

Does it disturb you—well, first of all, let's go, Mr. Porzak, to your point.

Mr. Corbin, I think you addressed it as well.

You have invested millions of dollars developing, paying for water rights. That is a balance sheet item for you, I think that you noted. Is that correct?

Mr. PORZAK. That is correct.

Mr. TIPTON. Does it disturb you that as you noted, Mr. Porzak, that there has been no authority granted by the Congress of the United States—by the Congress of the United States—but we have an agency, through a rulemaking process, that is trying to take your private property. Does that speak to you of the urgency?

Mr. PORZAK. It absolutely does it, and it creates great uncertainty, and great uncertainty inhibits investment.

Mr. TIPTON. You know and I know when we are looking at some of the bureaucracy here in Washington it mystifies them when we are talking about a balance sheet item. You seem to indicate that there is some actual value with water. Is that correct?

Mr. PORZAK. The Forest Service has admitted that, that they see enormous value, and that is the principal reason they want control over that value.

Mr. TIPTON. And with the proposed rule that they put forward that was only slapped down because they did not follow their own administrative procedures initially to be able to come forward with, what is the Forest Service going to offer you for this valuable resource that you have invested money in and paid for?

Mr. PORZAK. They have offered nothing.

Mr. TIPTON. Nothing. That speaks to the urgency, really, of legislation of Congress acting on behalf of private property rights and Western water rights, don't you think?

Mr. PORZAK. Absolutely.

Mr. TIPTON. Great. Do you have any insights, Mr. Porzak, why you noted 20 years this goes back, which I think speaks to the urgency. It is Groundhog Day every day for the Forest Service, they just keep doing the same thing over and over again in terms of overreach. What do you suppose, why do they continue to try and pursue your water rights?

Mr. PORZAK. They have actually, one of the principal attorneys for the Forest Service has written a Law Review article, which is a road map to exactly what they are doing. And they tried in the U.S. Supreme Court, *U.S.* v. *New Mexico*, and lost there to get the right to this water under Federal Reserve rights, they have tried in the State supreme courts, and they lost in that venue as well. And so now the strategy is to use their permitting authority as an end run around State water law to basically obtain those water rights for free. That has always been their game plan.

Mr. TIPTON. Ignore State water law, ignore Congress, just write a rule.

Mr. PORZAK. Yes. And there has always been a Federal deference to State water laws. And that is particularly important throughout

the West because so much water rises on the Forest Service or Federal lands, and that is the issue that we face where it is basically an end run around, as I mentioned, to that State water law.

Mr. TIPTON. We are talking about the U.S. Forest Service. Do you see any other Federal agencies that are going to try and pursue these policies as well?

Mr. PORZAK. In your area the CLUB 20, which you are familiar with. That question was put to the regional head of the BLM, and they asked, it was in May of 2012, what they thought about the Forest Service efforts. And they announced at that public meeting that they thought what the Forest Service was doing was great and if they succeeded they were going to do the same. And as a result of that, CLUB 20 passed its policy in May of 2012 opposing those efforts by all Federal agencies.

Mr. TIPTON. So the people don't want it, the State doesn't want it, the private property owners don't want this, but the Federal Government, the BLM, the Forest Service, perhaps others are going to continue a policy of taking.

Mr. PORZAK. That is correct.

Mr. TIPTON. With that, I yield back.

Mr. MCCLINTOCK. Mr. Huffman.

Mr. HUFFMAN. Thank you, Mr. Chair.

And thanks to the witnesses for being here and testifying. I am struck by some interesting contradictions in the testimony that we have heard today. And we have heard some very passionate testimony about deferring to State water law, a proposition I generally agree with. But we also heard some testimony on the issue of Western drought planning and drought relief, that we should simply clear away environmental obstacles to accessing water and leave more to the private sector and to market forces rather than becoming more dependent on public dollars.

Well, if we are to listen to this side of the table and defer to State water law, the State of California says all water belongs to the people, that it is not a public commodity that can just be bought and traded and moved around without regard for the multiple beneficial uses that have to be balanced. And so there is an interesting contradiction that emerges on these complex issues. And I guess I would say nothing is quite as simple as it sometimes seems in these types of hearings.

I had practiced enough water law in my career to know that these are very complicated issues, and I respect the testimony that we have heard from the ski industry and others. I want to understand this issue better. But I also know that we are hearing all kinds of legal terms of art and legal theories and legal issues about takings being discussed, and we have only one side of the story represented.

You may be right, all right? But I am having a hard time sorting it out and understanding the merits of what I am hearing because we don't have anyone from the Forest Service here to explain. I hear a lot of concerns and anxieties about what might happen if the policy goes in a certain direction, but I haven't heard anybody say that their snowmaking water has been actually taken away from them, that they are not able to make snow with it, or maybe

that they wouldn't even be able to make it under this policy change.

So there are a lot of questions I would love to ask of the folks who actually are being accused of these things, but they are not here. And there are a lot of questions I would like to ask, technical, legal, policy questions to folks like CRS, which would be a wonderful resource to have in the room. They are not here either because we are in the middle of this absurd government shutdown.

So I appreciate that we have scratched the surface of some interesting things today, but I just want to also express my frustration that we haven't been able to go beyond a pretty selective piece of that surface by virtue of the limitations that I have just discussed. And I hope perhaps the next time we discuss it—I am happy to continue the discussion—that we can have a more complete set of facts before us.

Thanks, Mr. Chairman.

Mr. MCCLINTOCK. If the gentleman will yield, I just want to assure him that the U.S. Forest Service informed the subcommittee prior to the shutdown that it would not be able to testify on this bill, it was not willing to testify on this bill because the new directive was being reviewed by the OMB, and that they were embargoed to comment on it. And so that has nothing to do——

Mr. HUFFMAN. And reclaiming my time, Mr. Chair, if I might, I guess I would suggest that maybe instead of just leaving it at that and vilifying them for the problem they had in being unable to testify, work with them. Why does everything have to be so adversarial with the Forest Service and these other agencies? Find a time that works for them when they are not subject to that constraint, get them in here so that we can have a complete discussion.

Mr. MCCLINTOCK. If the gentleman will yield again, I would also point out that the minority had the opportunity to name a witness to this panel for this bill and did not.

Mr. HUFFMAN. Well, we have the same government shutdown problems that you do right now in getting witnesses. And I yield back.

Mr. MCCLINTOCK. Mr. Gosar.

Mrs. NAPOLITANO. The gentleman wants to respond.

Mr. PORZAK. If I might respond to two issues that you raised. One is, as one who has specialized in Western water law for 40 years now, one thing I recognize is that each of the Western States are different. And while they have common water principles, they are very different. And that is why it is so important to defer to that State water law because what may work in California might not work in Colorado or Utah or other States.

The second issue is that when you do question the Forest Service, one question that I would ask them is that they say they want to preserve this water for that ski area or for the municipality or whatnot, but yet when the ski industry and the municipal interests ask them to agree to limit, if they took the water right, to limit it to the use to which it was previously put, and they absolutely refused to do that. They wanted the ability to change the water and to determine how much was truly needed for a ski use or a munic-

ipal use, and then be free to use the rest of that water for another purpose. I would challenge them on that.

Mr. MCCLINTOCK. Mr. Huffman, we are still on your time.

Mr. HUFFMAN. Thank you, Mr. Chairman. I would just say I hope we can get a chance to hear from them, and it is a discussion I would be happy to continue if we can get all the parties around the table to actually have it in the right way. Thank you, Mr. Chair. I will yield back.

Mr. PARKER. In Utah, it is interesting, there are a couple of points that I think are important. One is by statute the State of Utah has said those water rights that are related to livestock are appurtenant to the land, so they can't be transferred outside of that grazing allotment. The second part that I think is important is—it just left me, but——

Mr. MCCLINTOCK. Mr. Huffman's time is about to expire. We will go to Mr. Gosar and perhaps you can continue it there.

Dr. GOSAR. You want to start me at a new 5?

Mr. MCCLINTOCK. Yes, you will start at a new 5, that is correct.

Dr. GOSAR. Thank you. I think the last two people asking questions recalibrated mine.

So, Mr. Corbin, what kind of financial aspect can you quantify for me in legal fees you spend to validate your water rights? What kind of money do you spend to validate those rights from the industry?

Mr. CORBIN. For the industry?

Dr. GOSAR. For the industry.

Mr. CORBIN. I honestly couldn't tell you. I know that we as a ski company made a contribution to NSAA to participate in the lawsuit that occurred last year. I could not tell you off the top of my head how much we individually contributed or what the legal fees incurred by NSAA were in that lawsuit last year. I can tell you in any litigation we are involved in they are substantial.

Dr. GOSAR. I would like to quantify that. I would like that question answered. I would like you to go back into your records and quantify that for me.

For you, Mr. Parker, how about you? Can you quantify legally what it costs you—let's just say over the last 20 years and break it down in those areas—how much it costs you to legitimize your water claims?

Mr. PARKER. This is a broad area because there is continual challenges legally in Utah that are related to access to the land. And that access to the land is basically the access to the water. And so you have got to almost lump those together because as the Federal agencies reduce livestock numbers, let's say an allotment has 300 head of cattle that use the water on there and it is cut to 150, the Forest Service gains de facto water for 150 cattle because there are only half of the number there drinking now. Even without going through a court action, they gain water rights because of an action that reduces cattle numbers on it.

Stock producers and the agencies are at legal loggerheads. It is almost a continual battle. But the problem is, as we know, that the deep pockets of the Federal Government are pretty tough to beat when you are a rancher with a——

Dr. GOSAR. And that is what I am after. You know, the whole portal in the Western States is, if it doesn't have the water, you don't have a right. There is no access for that. So there is a purpose to where I am coming back to.

So Mr. Porzak, from your legal opinion and from law over the last 40 years, are there some remedies, are there some opportunities for the industries that are dictated by this water usage to be compensated for their plight versus the Federal Government?

Mr. PORZAK. You cannot compensate. Water is a threshold and indispensable commodity. It is why it is often difficult to settle water cases, because it is not a traditional business transaction where you can just compensate people with dollars and cents. You can't do without the water. If you don't have the water for the municipal providers you can't serve the residents. If you don't have the water for the ski industry you can't make snow, you can't provide the domestic requirements and all the other uses. So it is so indispensable that there is no other alternative.

Dr. GOSAR. So in regards to the private industry and the segments that are dependent upon this versus, as you quantified it, the deep pockets of the Federal Government, wouldn't something like equal access to justice, shouldn't that have some application for those that are egregiously harmed by the Federal Government? Shouldn't there be some type of compensation for an egregious action by the Federal Government over States and individuals?

Mr. PORZAK. There should be, but that is not what the ski industry or the municipal providers are asking for. They are just asking——

Dr. GOSAR. Well, I am well aware that is not what they are asking. The problem is, I have been sitting here for 2 years and I am a dentist impersonating a politician and there is a core problem here, we see radical environmental groups, we see the Federal Government chastising over and over and over again borrowing from the Federal Government's power of the purse to manipulate and negate your ability to defend yourself. So to me I think that there has got to be some mechanism here, whether it be the Equal Access to Justice funding that is equivocal in funding to your needs.

I see you want to talk.

Mr. PARKER. Yes. Generally, ranchers don't have access to the Equal Access to Justice Act because we are not claiming something is in violation of the law in these circumstances. You have to find the agency at fault in some way violating the Federal law, and this may rise to that level.

Dr. GOSAR. But that is what they are doing. My whole point is they are violating the Federal law because there is no Federal law that allows this jurisdiction. That is my whole point.

I am trying to live outside the box. My time has expired.

Mr. MCCLINTOCK. Thank you.

Mr. Stewart.

Mr. STEWART. Thank you, Mr. Chairman, for holding this hearing.

To the witnesses, thank you for coming. I know that it is inconvenient for you, for some of you it is expensive, you have other things to do. Thanks for being here with us today. Thanks for the service you give to your country.

If you don't mind I am going to spend a little time with you, Mr. Parker, both of us coming from Utah. And we have known each other for a little time. I look at you and I think, OK, here is a guy who maybe has spent a little time on a horse——

Mr. PARKER. Yes.

Mr. STEWART [continuing]. Knows a little bit about ranching, knows a little bit about farming. I want you to know that I do as well. I grew up farming and ranching. We still have both my family farm and my in-laws have a ranch and it is deep in our blood and we appreciate that lifestyle. I mean, there is nothing more American than the family farm or the family ranch, and it is something that we want to protect.

Mr. Parker, would you consider yourself an expert on ranching and farming concerns?

Mr. PARKER. I have been involved in ranching since I was born, yes, cattle and sheep ranching, yes, sir.

Mr. STEWART. And you represent a fairly large organization, as I understand, right?

Mr. PARKER. We do, 6 million member families in the United States that I am speaking for today.

Mr. STEWART. Six million. That is a substantial number.

Mr. PARKER. Yes.

Mr. STEWART. And I appreciate that. It seems to me, as I said, that you can speak with some authority then about farming and ranching concerns. And I would like to go back to your opening statement, if I could, something that you mentioned briefly, but I think it is worth coming back to, and that is your telling of what happened in Tooele County, which is a fairly rural county in Utah, it is west of Salt Lake. It is a county that I represent by the way. And you go back a few years, 2012, where we had agents from the Forest Service who were denying ranchers and farmers grazing permits unless they agreed to relinquish their private livestock water rights.

Look, that to me is just unheard of, and it is egregious to think of the impacts that that could have on these, what are almost in every case, family farms and family ranches. And I just wondered if you would elaborate on that and maybe just ask, have you ever heard or seen an example of such what I consider an abuse of power?

Mr. PARKER. This is, as far as I have seen it, as aggressive as I have seen it based on the livestock industry.

I think I want to start by noting that, like the ski industry, water is part of the balance sheet for livestock producers as well. It is part of the asset base that they borrow against.

For that group in Tooele County, they initially were asked to sign a change of use application, which would have transferred the right to use that as livestock water to the Federal agency, and then they would determine what they wanted to use it for. That is what a change of use application would allow. So they would turn over their ability to maintain that as livestock water on that allotment.

The Forest Service objected and said, well, we made a mistake, we only wanted them to sign a joint ownership agreement, and we really didn't mean it, they wouldn't be able to use their grazing al-

lotment. Well, you know, that is after the cow is out of the gate, so to speak.

And either way you cut it, that is a diminishment——

Mr. STEWART. Right.

Mr. PARKER [continuing]. Or a relinquishment of value and of a right that is granted under the sovereign rights of the State of Utah through the State engineer. It is a taking. There is no question about it.

Mr. STEWART. There is no question. I mean, I may own my home, but if someone demands joint ownership agreement of my home that is a substantial reduction of my rights and private property.

Can you tell us very quickly, how was that resolved? What was the outcome of that?

Mr. PARKER. The regional forester intervened and said, we really didn't mean to go there, and so they have kind of backed away from it at this point. But my view is what happens with the ski industry will be a telltale sign of how much further this creep could get into the livestock industry.

Livestock water across the State of Utah, the second most arid State in the Nation, if we don't have that broadly dispersed water for those livestock to graze out there on those rangelands the grazing value is gone, as is the water value.

Mr. STEWART. Well, and so in this case maybe they backed off a little, although they haven't backed off entirely on this, it hasn't been closed. But we know there are instances in Nevada, for example, where BLM and Forest Service agents ended up, some of them, in criminal charges and actually going to jail for——

Mr. PARKER. In the Hage case, yes, absolutely.

Mr. STEWART. Yes.

Mr. PARKER. They overfiled on their water, it went to court. The Supreme Court wouldn't hear it because they said it isn't ripe. But, yes, that is where we have been.

Mr. STEWART. That is exactly right.

So I see my time is up, but just very quickly, Mr. Chairman, look, when you have Federal agents that are acting in direct conflict of the law and they are doing what I consider extorting something as precious as water rights out of private citizens, well, how would we expect those citizens to react? How would we expect them not to have some, you know——

Mr. MCCLINTOCK. We will take that as a rhetorical question.

Mr. STEWART. Yes.

Mr. MCCLINTOCK. But there has been a request for a second round, so we will get back to that in a few minutes.

Mr. STEWART. OK. Thank you, Mr. Chairman. I appreciate it.

Mr. MCCLINTOCK. And I would like to pick up on that very point with Mr. Parker and Mr. Porzak.

Are we seeing an adversarial relationship begin to develop between this Government and the people, and particularly between the U.S. Forest Service and the users of our public lands? I raise that point because I am getting increasingly frantic complaints throughout my district of abusive behavior, most recently with the shutdown. Concessionaires who own their own shops, who own their own businesses literally being forced to close their doors solely because they are leasing land from the Federal Government.

Now, in the 17 shutdowns that have occurred over the past 37 years this has never happened before. It seems that the U.S. Forest Service is going out of its way to make life difficult for people, to inconvenience people, and almost seem to be reversing the entire original purpose of the Forest Service, which Gifford Pinchot described as managing the public lands for the greatest good for the greatest number in the long run. Are we seeing a fundamental change in this relationship?

Mr. PORZAK. The Forest Service and the ski industry, as Mr. Corbin pointed out, have always had a great working relationship. They have truly worked as partners on many issues. Where the line got drawn, though, was with respect to the takings of their water rights. That was the one time that the ski industry turned around and actually initiated a lawsuit against the Forest Service. It is clear on this issue a wedge has really been driven by the administration.

Mr. MCCLINTOCK. So this is unprecedented, and it is a fundamental shift in the relationships that have previously existed between the Government and the people.

Mr. PORZAK. Yes, Mr. Chairman.

Mr. PARKER. Mr. Chairman, from a livestock and agriculture standpoint, this is timber as well, if you go back to the 1960 Multiple Use Sustained Yield Act, there was a right granted to do certain things on the public land under that multiple use banner. FLIPMA changed that, and everything now is based on permitting, and those permits can be changed based on the whims of either Washington, DC, or the agents out there on the ground.

So, yes, we have seen a much more adversarial relationship because we have changed from a right to a permit and those permits can basically go all over the place based on whatever the politics of the day are.

Mr. MCCLINTOCK. Mr. Corbin, I am not going to put you in that hot seat, but I have talked to a number of operators over the years who tell me they are simply scared to death of giving candid answers because of their fear of retaliatory actions by the Forest Service. So I will excuse you from being placed in that position.

Mr. Crews, under the drought relief program, in your view, are the authorities provided under the program narrowly tailored toward the purpose of drought relief?

Mr. CREWS. No, I don't think they are. There are too many provisions there that are unreimbursed. The bulk of the money does go to well drilling, but contingency planning and transport and all these other provisions that are there don't get reimbursed by the beneficiary of the program. And I think in essence the approach is wrong.

Mr. MCCLINTOCK. Are there also expenditures in this other than drought relief in the narrow sense?

Mr. CREWS. Well, there is drought relief, there is solar panel, there is desalination, there are program choices that don't necessarily make a lot of sense.

Mr. MCCLINTOCK. Mr. Willardson, I have got two basic propositions. The first is that cheaper water is better than more expensive water, and that more water is better than less water. If we can agree on these propositions then I think we can also agree that the

entire purpose of our water policy is to protect against droughts; in other words, to store water during wet years in order to have it in dry years, to move it from wet areas to dry areas, and to assure that in times of drought there is plenty to go around. Doesn't that mean we should be building more storage?

Mr. WILLARDSON. I agree with your premise. And also I would point out that in 1995, I believe, with the Western Water Policy Review Commission, that the comments from the States all included storage as a solution to the problems that they face.

I would also point out, being a quasi-economist, that in Utah we have been criticized for having low water rates. Well, in the Salt Lake Valley we are at the base of the mountain which is fed by snowpack. There is very little distribution, there is very little treatment required, and subsequently the water is cheap. Now, does that mean we should artificially increase the price above what it is for production to encourage conservation? The State has set a goal of 25 percent reduction in use, but it is through other areas besides increasing price artificially.

Mr. MCCLINTOCK. Thank you. My time has expired.

Mrs. Napolitano.

Mrs. NAPOLITANO. Thank you, Mr. Chairman.

Mr. Corbin, in April this year, nearly 108 ski resorts in 24 of those States sent a letter of support of climate change plan. Are the resorts concerned about the impact of climate change and drought on the water resources available to the ski resorts, and how does this affect your business? And as a follow-up to that, what do you think the Federal role is in helping to deal with those two issues?

Mr. CORBIN. Indeed, we are very concerned about climate change or certainly the ongoing droughts that we have been experiencing recently in the West. As I said, water is kind of existential to our business. Without the water we are not in business. So to the degree that climate change, increasing temperatures, those sorts of things affect us, the desire on our own part to very carefully manage, conserve, optimize the use of our own water that we have obtained is very critical to us. So we believe we are incented perhaps more than anyone, for reasons that are both altruistic and economic, to preserve that water and use it wisely.

Mrs. NAPOLITANO. Thank you.

There are so many questions that I would have. And I agree with Mr. Jared Huffman that there are many things that we cannot ask because the people are not here to ask.

And, Mr. Chair, my staff was only given 6 business days to find a witness, so it is a little hard, especially with a shutdown, to be able to ensure that we have adequate representation.

But I don't disagree on 3176. I just think we need to have more input and more information to be able to make a more informed decision. Because we are here—well, it is 3189, sorry—that our role is to ensure that whatever law is passed, that whatever we look at, whatever input we have, that it is good for the people that we represent. That should be our number one priority. Second, that it is fair for the people, that they have a voice. We are supposed to be their voice. And also the last one, and I consider that just as important, is that it is good for business and it is good for the economy, because without that the people will suffer.

So with all that, we need to continue to ensure that we have all of the parties represented, that we have the voices of those that sometimes don't speak, can't speak for themselves, they can't afford attorneys, they don't have the ability to come in and say to Congress, you need to help us, whether it is financially or economically or viably, whatever. So I would suggest that we continue to have conversations and be able to figure out whether this can be resolved administratively, with our help or without our help, and that we understand that our responsibility is to all of you, as well as to the people that we all represent, and that we continue to find solutions that don't include spending an inordinate amount of money in attorney fees.

So with that, Mr. Chair, I yield back.

Mr. MCCLINTOCK. And I would remind the gentlelady that the notice was the same as the minority party used to give the majority party when the minority was the majority and the majority was the minority.

Chair recognize Mr. Tipton.

Mr. TIPTON. Thank you, Mr. Chairman. Just a couple of follow-up questions.

Mr. Parker, when you were commenting about permits that can be changed on a whim, if I wrote down your comment correctly, effectively what you are saying is, correct me if I am in error, but you are worried that once a rule is put into place they can also change it. Does that speak to the importance of the Water Rights Protection Act?

Mr. PARKER. That is absolutely right. In fact, one of the big challenges in the Hage case that Mr. Stewart brought up was whether or not the Federal Government could, in fact, stop access to the water. The Federal Court in Nevada and the District Court of Appeals in Washington, DC, both agreed that there is a right of access to those water rights, those livestock water rights.

Mr. TIPTON. I appreciate that.

And, Mr. Porzak, maybe you would like to get in on this as well, because we have talked about ski areas. We know the economic importance that Mr. Corbin has pointed out, certainly in my district and Mr. Polis' district, who is cosponsor of this legislation as well.

But you had spoken to the point that this is far more than just a ski area issue. You had mentioned the municipal water, grazing rights that Mr. Parker can certainly speak to, Mr. Amodei had to step out, but we have heard of water rights being taken by the Forest Service down in the State of Nevada as a condition of permit.

When we are talking about the municipal water that we are dealing with in Colorado, is this a real threat? And, again, why do you suppose the Federal Government, the Forest Service, is trying to pursue this taking?

Mr. PORZAK. It is control over a resource that is indispensable and enormously valuable. And they have made it clear that they want to have the control so that they can decide how that water is allocated and used. And time is of the essence on this issue to avoid future litigation.

Mr. TIPTON. So we can settle it once and for all to be able to protect your private property rights. We don't have to worry about

rules being rewritten. To use your quote, going back 20 years, this is not a new issue, it is time that we settle it, and this is a good piece of legislation to be able to accomplish that?

Mr. PORZAK. That is correct. And that is why we are so supportive of this legislation.

Mr. TIPTON. Thank you.

Mr. Parker.

Mr. PARKER. And the point I wanted to add to this is the States do allow, Utah does allow the Federal Government ownership of water. They just have to go through the same process as anybody else. They have to step up and show that they are going to put it to beneficial use. They have to apply, like anybody else. And if they are taking a water right that belongs to somebody else, they have to pay for it. What in the world is wrong with that?

Mr. TIPTON. You know, and I believe that is accurate in Colorado as well. We are just not going to allow the Federal Government to be able to put themselves in the first position at the expense of our ski areas, at the expense of our farm and ranch communities, at the expense of our municipalities. They have to play by the same rules as the rest of us.

Thank you, gentlemen. I appreciate your testimony here today. We do look forward to the Forest Service coming up and trying to express why in the world they believe they have the right to be able to take private property. Thank you.

And with that I yield back, Mr. Chairman.

Mr. MCCLINTOCK. Thank you.

Mr. Stewart is next. Mr. Stewart, if I could request, if you have any questions of Mr. Porzak could you make them first? He has to get out of here to the airport.

Mr. STEWART. Actually, I don't, Mr. Chairman.

Mr. MCCLINTOCK. Mr. Porzak, I want to thank you so much for being here and welcome you to leave at your discretion.

Mr. PORZAK. Thank you, Mr. Chairman. I appreciate it.

Mr. STEWART. I want to know how come he can go home and we don't get to.

Mr. PORZAK. I got the last seat on this airplane today.

Mr. MCCLINTOCK. Mr. Stewart.

Mr. STEWART. Yes. I am going to be very brief. You all have been patient with us as we delayed for the vote, and it is getting late, so I won't take but a few minutes. But I want to pursue what Mr. Tipton was saying and maybe draw some conclusions from it. Let's for the moment give the Forest Service or BLM agents the benefit of the doubt. Let's suppose that they have reasons for some of the things that they have done or at least that they had some objective that they were trying to achieve. And I would ask maybe Mr. Corbin or again my friend Mr. Parker, have they explained to you what it is that they are hoping? Why is it that they would exert these rights when it would be contrary to tradition and law?

Mr. PARKER. The argument that they have made from a livestock standpoint is they suggest that that is the way they can assure that it will be there in the future to maintain their multiple use obligation and allow grazing. But we have already made that happen in Utah under State statute, we have made it livestock water rights appurtenant to the land.

Mr. STEWART. I think that is exactly right, their desire to tie that water to the land. And I am going to come back to that.

Mr. Corbin, did you want to add to that?

Mr. CORBIN. I would agree. And the same rationale has been given to us, that the stated purpose is to have the water available for the special use permit in the ski area per se. But as has been testified here already, in the rule that was proposed in 2012 there really wasn't such a restriction. It was indeed contemplated that uses might be other than skiing and outside of our permit areas for other purposes, whether that is aquatic systems elsewhere or not.

Mr. STEWART. Whatever it might be.

Mr. CORBIN. It could be anything, yes.

Mr. STEWART. That is right. Which brings me to the point I would like to make on that, and that is, while they wanted to ensure that the land and the water were tied so that it would continue to be used for the purpose that it was being used, they were afraid essentially that the water rights would be sold downstream for other uses or for some other cause. But, you know, we asked—not myself, I wasn't in Congress at the time—but the Congress asked the Chief if he had any examples, even one, of that occurring, and this was several years ago and his answer was no, we don't have a single occurrence where that has actually been what took place.

And I am wondering, in the ensuing 2 or 3 years since then, are either of you aware of any example of that occurring?

Mr. CORBIN. In my experience, no sir, I am not aware of any ski area that has essentially stripped itself of its water and sold it as——

Mr. STEWART. Of course not. Of course they wouldn't do that.

Mr. CORBIN. It would severely hamper your ongoing enterprise. So there is no real reason to strip your water off your ski area.

Mr. STEWART. There is no-self interest of you doing that.

Mr. Parker, do you——

Mr. PARKER. And if you take where livestock water is, across Utah in particular, it has been developed out there across the landscape and it is an arid landscape. And a lot of them are just troughs where seeps have been run into it for water for livestock and wildlife. It would be impossible to be able to transfer that dispersed water out there across the Utah landscape, put it into a pipe, and send it to some municipality. It can't happen. The best use of it is livestock water for the economic opportunities that it affords rural Utah.

Mr. STEWART. Well, and so I started out my questions to you by saying let's give the agency agents the benefit of the doubt trying to understand why they are doing this. But their own reason, their justification, it is chasing a ghost. I mean, they are trying to solve a problem that doesn't exist. What they are trying to do is to preclude a problem that by their own admission does not exist.

Mr. PARKER. If you look at the findings in the Hage case, particularly when the Federal Government, the agents filed a trespass suit against the family, the agencies are strong arming these individuals out of being able to clean their ditches, out of using their water right. These are Federal agents that by court were fined for

illegal activities against those ranching families. Very few of them have the financial wherewithal to do this. The Hage's did and they found it pretty tough treading to go through the court system.

Mr. STEWART. Well, thank you. Again, to all of the witnesses, you have helped me make I think some important points with your experience.

And, Mr. Chairman, I yield back.

Mr. MCCLINTOCK. Thank you.

I would like to thank our witnesses for their valuable testimony today and again for their patience on our late start. Members of the subcommittee may have additional questions, and we would ask that you respond to those in writing. The hearing record will be open for 10 business days to receive those responses.

And if there is no further business, without objection, the subcommittee stands adjourned.

[Whereupon, at 4:17 p.m., the subcommittee was adjourned.]

[ADDITIONAL MATERIALS SUBMITTED FOR THE RECORD]

LETTER FROM CHAIRMAN MCCLINTOCK TO BUREAU OF RECLAMATION ON H.R. 3176

U.S. HOUSE OF REPRESENTATIVES,
COMMITTEE ON NATURAL RESOURCES,
WASHINGTON, DC,
OCTOBER 18, 2013.

Hon. MICHAEL L. CONNOR, *Commissioner*,
U.S. Bureau of Reclamation,
1849 C Street, NW,
Washington, DC 20240.

DEAR COMMISSIONER CONNOR:

As you know, I invited you to testify on H.R. 3176 at the Water and Power Subcommittee's October 10, 2013 hearing. However, you or any other agency personnel did not testify or submit comments on the legislation.

While you unfortunately chose not to attend, it is your agency's responsibility to provide the Administration's views on H.R. 3176. As such, I request that you provide written comments on the bill no later than November 1, 2013.

Thank you for your attention to this matter.

Sincerely,

TOM MCCLINTOCK, CHAIRMAN,
Subcommittee on Water and Power.

LETTER FROM CHAIRMAN MCCLINTOCK TO U.S. FOREST SERVICE ON H.R. 3189

U.S. HOUSE OF REPRESENTATIVES,
COMMITTEE ON NATURAL RESOURCES,
WASHINGTON, DC,
OCTOBER 18, 2013.

Hon. TOM TIDWELL, *Chief*,
United States Forest Service,
1400 Independence Ave., SW,
Washington, DC 20250.

DEAR CHIEF TIDWELL:

As you know, I invited you to testify on H.R. 3189 at the Water and Power Subcommittee's October 10, 2013 hearing. However, you or any other agency personnel did not testify or submit comments on the legislation.

While you unfortunately chose not to attend, it is your agency's responsibility to provide the Administration's views on H.R. 3189. As such, I request that you provide written comments on the bill no later than November 1, 2013.

Thank you for your attention to this matter.

Sincerely,

TOM MCCLINTOCK, CHAIRMAN,
Subcommittee on Water and Power.

RESPONSE TO CHAIRMAN MCCLINTOCK FROM U.S. DEPARTMENT OF THE INTERIOR ON H.R. 3189

U.S. DEPARTMENT OF THE INTERIOR,
WASHINGTON, DC,
NOVEMBER 13, 2013.

Hon. TOM MCCLINTOCK, *Chairman*,
House Subcommittee on Water and Power,
Washington, DC 20515.

DEAR MR. CHAIRMAN:

This letter provides the views of the Department of Interior (Department) on H.R. 3189, the Water Rights Protection Act, which was the subject of a legislative hearing by the Subcommittee on Water and Power. The Department has serious concerns that H.R. 3189 could significantly impact the Department's ability to manage water-related resources within public lands managed by the Department. The legislation is overly broad and could have numerous unintended consequences that would affect existing law and voluntary agreements. The Federal Government retains the right to regulate government lands under Article IV, Section 3 of the Constitution. Pursuant to that provision, the United States has authority to reserve water rights for its reservations and its property. Although the Federal Government generally defers to the States in the allocation and regulation of their water rights, a bill prohibiting two Federal departments from exerting some control over the exercise of water rights located on Federal lands threatens to undermine their long-standing authority to manage property and claim proprietary rights for the benefit of Indian tribes and reserved Federal lands. The bill would create uncertainty for many existing voluntary arrangements that are designed to produce a more efficient operation of U.S. facilities in the wake of climate change and reduction of water supplies.

H.R. 3189 may prohibit parties from voluntarily entering into agreements with the Department or its bureaus with respect to water rights in order to protect State, Federal or third party interests. For example, this bill could prevent the Bureau of Reclamation from partnering with parties who use groundwater for recreational activities on Reclamation lands, since the recreational users often apply jointly with Reclamation for a State permit since Reclamation is the land owner. Further, there are numerous examples where the Bureau of Reclamation has contracts with water users that include the transfer or relinquishment of pre-existing private water rights in exchange for a license or contract that provides project benefits at Reclamation facilities, e.g. storage or delivery of water. The bill, as written, may prohibit renewal of such contracts, thus interfering with voluntary, mutually beneficial agreements that improve water resource management. We do not believe it was the intent of this legislation to prohibit such agreements and we believe the Department should be explicitly excluded.

The legislation would also prohibit the National Park Service from exercising its authority to perfect water rights in the interest of the United States for waters diverted from or used on National Park Service lands, including operations associated with National Park Service concessioners, lessors or permittees. The requirement that all water rights on National Park Service lands be held in the name of the United States is grounded, in part, on the potential damage and disruption that privately held water rights could cause to park resources and operations.

As drafted, the legislation would also impose unnecessary restrictions on the Bureau of Land Management's ability to cooperatively mitigate impacts to sensitive water resources. The BLM frequently partners with public land users through collaborative agreements to plan, finance, and develop water resources. The legislation would not provide additional protections for the holders of water rights beyond current BLM policy, and if enacted, would jeopardize the BLM's ability to manage water-related resources vital to many multiple uses on public lands.

We appreciate the opportunity to present the Department's views on H.R. 3189. The Office of Management and Budget has advised that there is no objection to the transmittal of these views from the standpoint of the Administration's program. If you have any questions, please call me, or Libby Washburn, Deputy Commissioner for External & Governmental Affairs, Bureau of Reclamation, at 202.513.0616.

Sincerely,

ANNE CASTLE,
Assistant Secretary for Water and Science.

PREPARED STATEMENT OF USDA FOREST SERVICE

H.R. 3189, WATER RIGHTS PROTECTION ACT

Chairman McClintock, Ranking Member Napolitano, and Members of the Subcommittee, thank you for the opportunity to provide the U.S. Department of Agriculture's views on H.R. 3189, the Water Rights Protection Act. We defer to the U.S. Department of the Interior for its views on this bill as it pertains to its bureaus.

It is not in our interest or policy to take private water rights. Our interest is in sustaining skiing as a recreation opportunity on National Forest System (NFS) lands now and in the future. Water rights are increasingly critical to many ski areas for the purpose of snowmaking. Our interest is not in taking the water right, but in assuring that a necessary amount of water is available so that skiing can continue to be an important recreation opportunity in the National Forests.

Based on comments and a series of town hall meetings held this year, we will be proposing changes to the ski area water rights clause that address the concerns associated with the previous ski area water rights clause. We believe that these changes will provide assurances to the public and communities that depend on economic activities from ski areas that they will continue to provide recreation opportunities. Further, we believe that these objectives can be met without requiring the transfer of privately owned water rights to the Government. Once the proposed permit clause is published in the *Federal Register*, the public will have an opportunity to comment, and the Forest Service will determine how to proceed based on those comments.

Because we are moving forward expeditiously with an opportunity for public comment on the ski area water rights clause in response to a 2012 court decision, the Department believes H.R. 3189 is unnecessary. Further, the Department is concerned that H.R. 3189 as drafted would impede the statutory mission of the Forest Service to provide for multiple uses, including recreation, under the Organic Administration Act and Multiple Use Sustained Yield Act (MUSYA). Specifically, the bill would preclude the Forest Service from requiring as a condition of a permit issued for MUSYA purposes, such as a ski area or grazing permit, the transfer of associated water rights to a succeeding permittee. Thus, the bill could complicate the United States' ability to prevent severance of water rights from associated permitted uses of Federal lands, as necessary to ensure the continuing availability of water for snowmaking and other forest uses.

In addition, the legislation could also generate litigation over imposition of conditions on a special use authorization or a Federal Energy Regulatory Commission license to require a bypass flow. Inability to impose bypass flow requirements would significantly affect the Forest Service's management of water resources to protect the environment, e.g., to ensure adequate water is available for fisheries or threatened and endangered species.

Thank you again for this opportunity to comment on H.R. 3189.

LETTERS SUBMITTED FOR THE RECORD ON H.R. 3189

HEAVENLY MOUNTAIN RESORT,
LAKE TAHOE, NV,
OCTOBER 7, 2013.

Hon. TOM MCCLINTOCK, *Chairman*,
Hon. MARK AMODEI,
House Subcommittee on Water and Power,
1522 Longworth House Office Building,
Washington, DC 20515.

Re: H.R. 3189—Water Rights Protection Act

DEAR CHAIRMAN MCCLINTOCK AND CONGRESSMAN AMODEI:

Heavenly Mountain Resort operates a public land ski area in the States of California and Nevada under a Special Use Term Permit from the USDA Forest Service.

Heavenly supports H.R. 3189 the Water Rights Protection Act as proposed for the following reasons:

1. Water rights developed, paid for and perfected by the ski area permittee are a right of use that is protected by the State Constitution: any taking of those rights by the Federal Government requires fair and equitable compensation;
2. In Nevada for example, all surface and groundwater water is owned by the State which grants the rights to use it through the State Engineer to private and public entities through a detailed permitting system. It is not possible for a private ski area permittee to transfer to the Federal Government something that it does not own;
3. Tourism and outdoor recreation is the economic base of our community and provides several thousand direct and indirect jobs annually;
4. In the Sierra Nevada mountains in particular where natural snowfall has been inconsistent in recent years, the ability to acquire and utilize water rights for snowmaking is a critical business issue that allows resorts like Heavenly to have successful ski seasons;
5. Using the water rights to make snow and manage it throughout the season supports a significant number of jobs in our community: in particular early season snowmaking is critical to our local economy both directly and indirectly because it provides consistency as to when we can open to the public;
6. Based on our presence in the community and our long-term commitment to its sustainability and economic well-being, Heavenly is clearly better suited than the Federal Government to responsibly use and reliably protect this valuable resource; and
7. While we enjoy a close working relationship with the Forest Service in providing high-quality outdoor recreation to the American public, their previous attempts at requiring transfer of water rights as a permit condition is unnecessary and appears to be a solution in search of a problem that does not actually exist in our industry.

Thank you for the opportunity to provide our input to this important bill. I am sorry that I cannot be with you in person to present our testimony.

Please share it with members of the subcommittee and add it to the hearing record.

Sincerely,

ANDREW STRAIN,
Vice President of Planning & Governmental Affairs.

NATIONAL ASSOCIATION OF CONSERVATION DISTRICTS,
WASHINGTON, DC,
OCTOBER 21, 2013.

Chairman HASTINGS, and Ranking Member DEFAZIO,
Committee on Natural Resources,

Chairman MCCLINTOCK, and Ranking Member NAPOLITANO,
Subcommittee on Water and Power,
1324 Longworth House Office Building,
Washington, DC 20515.

Re: The Water Rights Protection Act—H.R. 3189

DEAR CHAIRMAN HASTINGS, RANKING MEMBER DEFAZIO, CHAIRMAN MCCLINTOCK AND RANKING MEMBER NAPOLITANO:

The National Association of Conservation Districts (NACD) supports the bipartisan H.R. 3189, the Water Rights Protection Act. NACD represents America's 3,000 locally led conservation districts working with millions of cooperating landowners and operators to help them manage and protect land and water resources on private and public lands in the United States. Established under State law, conservation districts share a single mission: to work cooperatively with Federal, State and other local resource management agencies and private sector interests to provide technical, financial, and other assistance to help landowners and operators apply conservation to the landscape.

NACD understands that water is a vital natural resource that needs to be protected. This bill would prevent Federal agencies from requiring public-lands users to turn over water rights as a condition of issuing or renewing permits. Not only is compelling individuals to relinquish water rights for permits unfair to those who have paid to use their water permits, the required waiver of water rights to the Federal Government overlooks State laws concerning water rights transfer and ownership as well as Constitutional takings issues.

Stakeholders ranging from individual ranchers and farmers to municipalities rely on private water rights to provide drinking water, provide agricultural water, run their operations, and secure loans. The loss of these water rights would take away their ability to address local water concerns and plan ahead to meet their specific long-term water needs. H.R. 3189 would secure water rights for those that have paid for them and provide stakeholders the stability they need to appropriately plan for and manage natural resources at the local level.

Thank you for your consideration of these important water resource issues as they pertain to H.R. 3189.

Sincerely,

EARL J. GARBER,
President.

RIO GRANDE WATER CONSERVATION DISTRICT,
ALAMOSA, COLORADO,
OCTOBER 15, 2013.

Hon. SCOTT TIPTON,
218 Cannon House Office Building,
Washington, DC 20515.

DEAR REPRESENTATIVE TIPTON:

One of the Rio Grande Water Conservation District's purposes is "*for the conservation, use and development of the water of the Rio Grande*". We understand that there has been an attempt by certain Federal agencies to require Federal permittees to assign their private water rights to the Federal Government as a condition of the permit. If this policy continues it will create a great risk to the water users both in the San Luis Valley and statewide. The Rio Grande Water Conservation District supports H.R. 3189, *The Water Rights Protection Act*, aid will work with you to garner support for this bill to ensure protection of privately owned water rights from claims by Federal agencies.

As we understand, H.R. 3189 was introduced as a means to protect water users from the seizure of privately owned water rights without just compensation. We believe that H.R. 3189 grants no new rights to any party, nor does it in any way infringe on existing rights of individuals, States or the Federal Government. It ap-

pears to us that this legislation simply reaffirms what has been existing law for generations and which is expressed in numerous places in Federal law, including the Mining Act of 1866; the 1897 Organic Act establishing the U.S. Forest Service; the Taylor Grazing Act; and the Federal Land Policy and Management Act of 1976. The bill supports long-established recognition of the primacy of State water law and the title to water rights that are established thereunder.

We are aware of no provision in Federal statutory law authorizing or permitting the Forest Service or the Bureau of Land Management to compel owners of lawfully acquired water rights to surrender those rights or to require that they be in the name of the United States. H.R. 3189 does nothing more than assure holders of BLM or Forest Service permits that their lawfully acquired water rights will not be abridged and that Federal agencies may not use the permit process to acquire water rights that are owned by non-Federal entities.

We thank you for taking a leadership role in addressing this crucial issue and look forward to working with you on this important legislation.

Sincerely,

STEVEN VANDIVER,
General Manager.